

University of Pennsylvania Carey Law School

## Penn Law: Legal Scholarship Repository

---

Faculty Scholarship at Penn Law

---

2004

### Tribal Immunity and Tribal Courts

Catherine T. Struve

*University of Pennsylvania Carey Law School*

Follow this and additional works at: [https://scholarship.law.upenn.edu/faculty\\_scholarship](https://scholarship.law.upenn.edu/faculty_scholarship)



Part of the [Civil Procedure Commons](#), [Courts Commons](#), [Indian and Aboriginal Law Commons](#), [Jurisdiction Commons](#), [Legal History Commons](#), and the [Litigation Commons](#)

---

#### Repository Citation

Struve, Catherine T., "Tribal Immunity and Tribal Courts" (2004). *Faculty Scholarship at Penn Law*. 733.  
[https://scholarship.law.upenn.edu/faculty\\_scholarship/733](https://scholarship.law.upenn.edu/faculty_scholarship/733)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# TRIBAL IMMUNITY AND TRIBAL COURTS

Catherine T. Struve<sup>†</sup>

## I. INTRODUCTION

One of the ironies of federal Indian law is that the Supreme Court has stripped tribes of many of the positive aspects of governmental authority—key aspects of legislative and adjudicative authority, for example—while leaving intact a negative power: the power to avoid liability through the assertion of sovereign immunity from suit. How, if at all, should tribes use this power? A blanket assertion of immunity would deny a remedy to those with legitimate grievances against tribal governments. Moreover, because current doctrine holds that both Congress and the Supreme Court can diminish the powers of tribal governments, an aggressive assertion of tribal immunity could endanger tribes by inviting further incursions on their sovereignty. This essay argues that tribes should use their immunity as a forum-allocation device: Tribes that waive immunity in tribal courts but not elsewhere can simultaneously provide redress for valid claims and strengthen tribal court systems.

My argument proceeds in four parts. In Part II, I summarize relevant principles concerning tribal sovereignty in general and tribal sovereign immunity in particular, and conclude that tribal immunity has a strong basis in Supreme Court precedent. In Part III, I survey caselaw and constitutional and statutory provisions from selected tribes; these sources indicate that many Indian nations currently provide significant remedies, in tribal court, for claims alleging misconduct by tribal governments. Not all tribes provide a full array of remedies for government action; but lest that fact be taken out of context, I briefly review, in Part IV, the current landscape of remedies against nontribal governments. Part IV notes that although the federal and state governments have increased the availability of remedies

---

<sup>†</sup> Assistant Professor, University of Pennsylvania Law School. I am grateful to Robert Clinton and Louise Weinberg for organizing the panel at which this paper was presented, to my fellow panelists—Robert Clinton, Frank Pommersheim, and Judith Resnik—for illuminating discussions of related issues, and to Matthew Adler, Frank Goodman and Judith Resnik for extremely helpful comments on prior drafts. I thank Richard Horvath and Marianne Staniunas for research assistance, and Ronald Day for his help in obtaining source materials. Remaining errors, of course, are mine.

against government defendants, the remedies still are far from complete. In Part V, I argue that the justifications for tribal sovereign immunity are in key respects stronger than those for state sovereign immunity. Ultimately, however, tribes will face pressure to waive immunity. I contend that tribal waivers of immunity from suit in tribal courts can both provide redress to those with legitimate claims and refute the contentions of those who disparage the independence and competence of tribal courts. To assist tribes in expanding the availability of tribal-court remedies against tribal governments, the federal government should increase its funding for tribal court systems. In addition, some tribes may wish to consider pooling their judicial resources, through structures such as intertribal courts of appeals. I conclude by considering the probable effect of the course I advocate. The Supreme Court might discount tribal efforts to provide fair remedies in tribal courts, but some members of Congress may give weight to those endeavors. This likelihood underscores the importance of the Court's decision to defer to Congress on questions of tribal immunity.

## II. DOCTRINAL FOUNDATIONS

Tribal sovereign immunity is comprehensible only as an aspect of tribal sovereignty more generally. Thus, Part II.A. discusses general precepts of Indian tribal sovereignty and summarizes key events in the history of United States-tribal relations. Having thus laid the doctrinal groundwork, I will turn, in Part II.B., to the doctrine of tribal sovereign immunity in particular.

### *A. Tribal Sovereignty*

The relevant history is well established, but at the risk of repeating the work of many other commentators, I will briefly review some key points concerning tribal sovereignty and the inroads made upon it by the federal government.

Prior to European contact, Indian tribes exercised full sovereign authority;<sup>1</sup> after contact, the European powers dealt with the tribes by

---

1. See *Worcester v. Georgia*, 31 U.S. 515, 542–43 (1832) (“America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”). This is not to say that tribal governments prior to European contact reflected European ideas of nationhood. William McLoughlin, discussing the Cherokees, wrote:

means of treaties.<sup>2</sup> The young United States continued the practice of treating tribes as sovereigns, negotiating and entering into treaties with them until 1871.<sup>3</sup> In substance, the federal and state governments' treatment of Indian nations sometimes ranged from the unfair to the genocidal. During the early nineteenth century, for example, non-Indians used pressure tactics and violence in their efforts to obtain tribal lands, and the federal government ultimately pressed on the southeastern tribes the policy of "removal" from the tribes' homelands to lands west of the Mississippi.<sup>4</sup> It was a brutal policy; when the last Cherokees east of the Mississippi moved west along the Trail of Tears,<sup>5</sup> the conditions before, during and after the journey were so harsh that some 4,000 of them died.<sup>6</sup> In form, however, the

---

The term "nation" was first given to Indian peoples by the Europeans. Prior to the eighteenth century, the Cherokees, like most tribes, had a highly decentralized political system in which local or town chiefs and councils made most of the political decisions. For their own reasons, the Europeans tried to force the tribes into nationalist centralization under one chief . . . , one council, one process of majority rule.

WILLIAM G. McLOUGHLIN, *AFTER THE TRAIL OF TEARS: THE CHEROKEES' STRUGGLE FOR SOVEREIGNTY, 1839-1880*, at 6 (1993).

2. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 3 (1983); DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 26-36 (2001); Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 *TULSA L. REV.* 661, 684-85 (2002).

3. Judith Resnik has noted that "Indian tribes . . . seem to be recognized [in the Constitution] as having a status outside its parameters. Indian tribes are treated as entities with whom to have commerce and to make treaties. The tribes also seem to be freed from the taxing power of either the state or federal governments." Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 *U. CHI. L. REV.* 671, 691 (1989). Thus, "one might describe the relationship between the Indian tribes and the United States as that between two sovereigns, and locate the relevant legal discourse as that of international law." *Id.*

4. As Russell Thornton explains:

It is estimated that as many as 100,000 American Indians were removed from eastern homelands to west of the Mississippi River during the first half of the nineteenth century; this may even be an underestimation. Most of the total number were members of five tribes: Cherokee, Chickasaw, Choctaw, Creek, and Seminole, along with remnants of other southeastern Indian groups.

Russell Thornton, *The Demography of the Trail of Tears Period: A New Estimate of Cherokee Population Losses*, in *CHEROKEE REMOVAL: BEFORE AND AFTER* 75 (William L. Anderson ed., 1991) (citation omitted).

5. A few Cherokees managed to avoid removal. See John R. Finger, *The Impact of Removal on the North Carolina Cherokees*, in *CHEROKEE REMOVAL: BEFORE AND AFTER* 96, 105-06 (William L. Anderson ed., 1991) (estimating "a total of about 1,400 who avoided removal").

6. As Gary Moulton has recounted,

federal government treated the tribes as sovereign entities. Thus, for example, the removal of the southeastern tribes occurred pursuant to “treaties” purportedly entered into by those tribes.<sup>7</sup>

In a famous trilogy of cases decided prior to the Cherokee removal, the Marshall Court had discussed the status of Indian nations as sovereign governments. In *Johnson v. M’Intosh*,<sup>8</sup> the Court held that the United States had inherited from the European colonial powers the sole right to acquire land held by the Indian nations and to grant fee title to that land.<sup>9</sup> The Court reasoned that the European “discovery” of the Americas limited the Indian nations’ ability to alienate their own lands: “their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”<sup>10</sup> The Court recognized some

---

No accurate figures exist for the number who died as a result of this tragic trek . . . . Some put the death toll at sixteen hundred. When added to the number who fell victim to the harsh encampments before removal and the many who succumbed to the debilitating circumstances after arrival, nearly four thousand Cherokees—or a quarter of the tribe—were lost in the process.

GARY E. MOULTON, JOHN ROSS, CHEROKEE CHIEF 100 (1978); see also MCLOUGHLIN, *supra* note 1, at 7 (estimating that “the total number of Cherokee deaths during the removal process [was] at least 4,000”). But see Thornton, *supra* note 4, at 86, 93 (arguing that “[a] total [Cherokee] mortality figure of 8,000 for the Trail of Tears period . . . may not be at all unreasonable,” and—after assessing the effects of the Cherokee removal by considering estimated rates of “fertility and migration as well as mortality”—concluding that “[o]ver 10,000 additional Cherokees would have been alive sometime during the period 1835 to 1840 had Cherokee removal not occurred”). The removal of other tribes also caused great suffering; Russell Thornton notes that the conventional estimates of 4,000 Cherokee dead “would place Cherokee mortality about midway in the mortality losses of the other four major southeastern tribes, as well as can now be ascertained.” *Id.* at 85 (discussing mortality rates for Choctaws, Chickasaws, Creeks and Seminoles).

7. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 120–21 (2002) (discussing treaties concerning removal).

While Congress debated and narrowly passed the Removal Act of 1830, establishing as national policy the removal of tribes from existing state boundaries to west of the Mississippi River, both the text and the surrounding legislative history clearly reflect the view that Congress had no authority under the Constitution to unilaterally impose this result on the Indian tribes.

*Id.* at 136. Some “treaties” were concluded with groups whose authority to act on behalf of the relevant tribe was highly questionable. Thus, for example, the Treaty of New Echota, by which the Cherokee Nation purportedly agreed to removal, was negotiated and entered into by only a fraction of the tribe, and was promptly denounced by the Cherokee National Council and by John Ross, who called the Treaty “a fraud upon the Cherokee people.” See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 179 (1994).

8. 21 U.S. 543 (1823).

9. *Id.* at 587–89.

10. *Id.* at 574.

difficulties with this proposition, but held that “[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim . . . .”<sup>11</sup> However, the Court made clear that the United States only had the right to regulate the transfer of tribal lands to non-Indians; this federal power did not alter the tribes’ right to *possess* the lands.<sup>12</sup>

In *Cherokee Nation v. Georgia*,<sup>13</sup> the Cherokee Nation invoked the Supreme Court’s original jurisdiction, seeking an injunction to restrain the state of Georgia and state officials from enforcing Georgia law within the Cherokee Nation’s territory.<sup>14</sup> The Court disclaimed jurisdiction to hear the claim, reasoning that the Cherokee Nation was not a “foreign state” for purposes of Article III’s grant of federal court subject matter jurisdiction over “Controversies . . . between a State . . . and foreign states.”<sup>15</sup> This conclusion in no way implied that the Nation lacked sovereignty; to the contrary, Chief Justice Marshall expressly recognized “the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself.”<sup>16</sup> Referring to the history of federal relations with the Cherokees, Marshall observed that “[t]he acts of our government plainly recognise the Cherokee nation as a state, and the Courts are bound by those acts.”<sup>17</sup> However, Marshall reasoned that the tribes were under the “protection” of the United States, such that “any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory.”<sup>18</sup> Marshall argued that this relationship—which he analogized to “that of a ward to his guardian”—rendered the tribes “domestic dependent nations.”<sup>19</sup> But despite this view of the United States’ protective role vis-à-vis the Cherokees, Marshall concluded, “If it be true that the Cherokee

---

11. *Id.* at 588.

12. *Id.* at 603 (“It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned.”).

13. 30 U.S. 1 (1831).

14. *Id.* at 15.

15. *Id.* at 20; U.S. CONST. art. III, § 2. Justices Thompson and Story, by contrast, believed that the Nation did come within the definition of “foreign States.” See *Cherokee Nation*, 30 U.S. at 68–69 (Thompson, J., joined by Story, J., dissenting).

16. *Id.* at 16.

17. *Id.*

18. *Id.* at 17–18.

19. *Id.* at 17. As Robert Clinton has pointed out, “dependence for Chief Justice Marshall was not a source of federal authority over the Cherokee Nation. Rather, it constituted a description of a relationship created by treaty in which the federal government owed the Cherokee certain obligations of protection.” Clinton, *supra* note 7, at 141.

nation have rights, this is not the tribunal in which those rights are to be asserted.”<sup>20</sup>

The following year, Georgia’s incarceration of a white missionary named Samuel Worcester brought the question of Georgia’s power in Cherokee territory back before the Court, and this time the Court exercised jurisdiction.<sup>21</sup> Worcester had been convicted in Georgia state court of “residing within the limits of the Cherokee nation without a license,” in violation of purported Georgia law, and had been sentenced to four years hard labor.<sup>22</sup> The Court reversed the judgment of conviction, holding that the Georgia statute on which it was based violated federal law.<sup>23</sup> Chief Justice Marshall, writing for the Court, centered his reasoning on the principle that relations with the Indian nations were the sole prerogative of the federal government, to the exclusion of the states.<sup>24</sup> In the process, Marshall made clear that the relationship between the tribes and the federal government did not strip the tribes of their sovereign character. “This relation,” Marshall stated, “was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”<sup>25</sup>

This view of the Indian nations as retaining sovereignty—except with respect to foreign relations and land cession—was reflected in federal treaty and legislative practice through most of the nineteenth century. A recent survey of federal legislation up to 1885 found only one statute “that purported to directly govern any Indian in Indian country.”<sup>26</sup> Even this statute—which applied federal criminal law to certain crimes within Indian territory—applied to Indians only “when they harmed the person or property of anyone subject to the protection of the United States and then only when the offender’s tribe refused to punish them or otherwise resolve

---

20. *Cherokee Nation*, 30 U.S. at 20.

21. In addition to Worcester, others had been tried and convicted for similar “crimes.” See *Worcester v. Georgia*, 31 U.S. 515, 531–32 (1832). Elizur Butler, another missionary, see Douglas C. Wilms, *Cherokee Land Use in Georgia Before Removal*, in *CHEROKEE REMOVAL: BEFORE AND AFTER* 1, 9 (William L. Anderson ed., 1991), also sought review in the Supreme Court, see *Worcester*, 31 U.S. at 534, and the Supreme Court reversed his conviction as well as Worcester’s, see *id.* at 597.

22. *Worcester*, 31 U.S. at 537, 540. The charges against Worcester also included the assertion that he had not “taken the oath to support and defend the constitution and laws of the state of Georgia.” *Id.* at 537.

23. *Id.* at 561–63.

24. *Id.* at 557.

25. *Id.* at 555.

26. Clinton, *supra* note 7, at 135 (citing Act of Mar. 3, 1817, ch. 92, 3 Stat. 383; Act of June 30, 1834, ch. 161, § 25, 4 Stat. 729; Act of Mar. 27, 1854, ch. 27, §§ 3–6, 10 Stat. 269, 270 (codified as amended at 18 U.S.C. § 1152)).

the matter.”<sup>27</sup> The federal government continued to deal with Indian nations by means of treaties until 1871, when a power struggle between the House and Senate led to the inclusion, in an appropriations bill, of language stating that the United States would no longer enter into treaties with Indian tribes.<sup>28</sup> For some decades after that, the federal government continued to negotiate with tribes concerning proposed federal legislation affecting tribal interests.<sup>29</sup>

Near the end of the nineteenth century, however, the tide turned against tribal sovereignty, as the federal government asserted regulatory authority over tribe members and adopted the policy of allotment of tribal land. The enactment of the Major Crimes Act<sup>30</sup> in 1885 marked the first significant assertion of federal legislative jurisdiction over Indians in Indian country.<sup>31</sup> In upholding the Act against constitutional challenge, the Court in *United States v. Kagama*<sup>32</sup> conceded that the Constitution itself provided no basis for such an exercise of federal authority.<sup>33</sup> Rather, the Court asserted that the federal government’s “duty of protection” to the tribes gave the United States power to regulate the tribes.<sup>34</sup> Robert Clinton has highlighted the perversity of this assertion: “The very trusteeship that Chief Justice Marshall suggested in *Cherokee Nation* implemented the treaty-based federal obligation to protect Cherokee sovereignty and territorial integrity was employed in *Kagama* as a source of federal authority to attack tribal sovereignty.”<sup>35</sup>

Despite this fundamental problem in its reasoning, *Kagama* was cited thenceforward as authority for the federal government’s plenary power with respect to Indian tribes:<sup>36</sup> and Congress lost little time in exercising its purported authority. The year after the Court decided *Kagama*, Congress passed the General Allotment Act of 1887.<sup>37</sup> This statute, by directing the

---

27. *Id.*

28. *Id.* at 167–68 (citing Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71); see also Steven Paul McSloy, *The “Miner’s Canary:” A Bird’s Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 735 (2003).

29. See Clinton, *supra* note 7, at 168–69.

30. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153).

31. See Clinton, *supra* note 7, at 170.

32. 118 U.S. 375 (1886).

33. *Id.* at 378–79.

34. *Id.* at 384.

35. Clinton, *supra* note 7, at 175.

36. *Id.* at 177–78.

37. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 334, 339, 341–42, 348, 349, 354, 381 (2000)). The allotment era ended with the enactment of the Indian Reorganization Act of 1934. See *infra* notes 42–44 and accompanying text.



allotment of tribal lands to individual Indians, aimed both to make Indian lands available to whites and to weaken existing tribal governments.<sup>38</sup> Even where tribes asserted that the federal allotment efforts violated existing treaty rights and the Fifth Amendment, the Court refused to grant relief. Thus, in 1903, the Court held in *Lone Wolf v. Hitchcock*<sup>39</sup> that the federal government's trust relationship with the tribes empowered the United States unilaterally to override (by statute) its treaty agreements with the tribes.<sup>40</sup> The trust relationship, moreover, required the Court to "presume that Congress acted in perfect good faith" in its dealings with the tribes; if Congress had wronged the tribes, it was from Congress—not the Court—that they must seek relief.<sup>41</sup>

In the 1930s, after it had become clear that federal policy had produced widespread poverty and misery on Indian reservations, the New Deal Congress ended the allotment era.<sup>42</sup> In the Indian Reorganization Act of 1934,<sup>43</sup> Congress not only put a stop to allotment, but also imposed restrictions on the transfer of tribal land and encouraged the formalization of tribal governments.<sup>44</sup> Federal support for Indian self-government waned at mid-century, however, and the late 1940s and the 1950s saw a number of federal efforts to terminate the existence of tribal governments.<sup>45</sup> The pendulum began to swing back once again in the 1960s, with the adoption of Great Society initiatives that included Native Americans within their scope.<sup>46</sup> In a 1970 message to Congress, President Nixon repudiated the termination policy and announced an era of Indian self-determination in which the tribes would have input into federal policies affecting them.<sup>47</sup>

---

38. See Clinton, *supra* note 7, at 179 (noting that the Act "sought to break down tribal cohesion and the authority of traditional tribal leaders by changing the Indian land tenure system from communal tribal ownership to individually-owned allotments" and that it "opened Indian reservations to non-Indian settlement for the first time"); DELORIA & LYTLE, *supra* note 2, at 9–10.

39. 187 U.S. 553 (1903).

40. *Id.* at 566.

41. *Id.* at 568; see Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a "Mere Change in the Form of Investment,"* 38 TULSA L. REV. 37, 39 (2002) (arguing that "*Lone Wolf* was a travesty, not only because it placed Indians beyond the reach of the Constitution, but also because it legitimated both an act of conquest and what is probably the most massive uncompensated taking of property in United States history").

42. See DELORIA & LYTLE, *supra* note 2, at 12–15.

43. Act of June 18, 1934, 48 Stat. 984, ch. 576 (codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466–70, 471, 472, 473, 474, 475, 476–78 & 479 (2000)).

44. DELORIA & LYTLE, *supra* note 2, at 14.

45. *Id.* at 15–21.

46. *Id.* at 22.

47. See President Nixon, Special Message on Indian Affairs (July 8, 1970), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 256–58 (3d ed., Francis Paul Prucha ed., 2000).

Federal legislative and executive branch support for tribal self-determination and self-government has remained relatively constant since then.<sup>48</sup>

At the same time that the political branches were becoming more sympathetic to tribal interests, concerns also arose with respect to the rights of individual Indians vis-à-vis tribal governments. Noting that those governments are not bound by the Fifth or Fourteenth Amendments, Congress in 1968 passed the Indian Civil Rights Act (“ICRA”),<sup>49</sup> which applies to tribal governments constraints similar to those found in the Bill of Rights and the Equal Protection Clause. The ICRA provisions are not identical to those in the Bill of Rights; for example, the ICRA does not include an Establishment Clause.<sup>50</sup> In addition, the ICRA creates no explicit cause of action enforceable in federal court, except for habeas corpus review for individuals in tribal custody.<sup>51</sup> In *Santa Clara Pueblo v. Martinez*,<sup>52</sup> the Supreme Court refused to imply any additional right of action in federal court; the Court held that Congress intended that—outside the habeas context—relief under the ICRA should be sought from the tribe and not from federal courts.<sup>53</sup> *Martinez*, like the ICRA itself, can be seen as a compromise between the interests of civil rights claimants and the interests of tribes: the Court upheld the ICRA as a valid exercise of plenary federal power over the tribes,<sup>54</sup> but directed most ICRA claimants to seek relief only from the tribes themselves.<sup>55</sup>

More generally, during most of the twentieth century the doctrine of Congress’s plenary power over Indian tribes had two effects on the adjudication of tribal rights: it often led the courts to deny judicial remedies for harms inflicted by the federal government, but it also restrained the courts from diminishing tribal powers in the absence of congressional

---

48. See Seielstad, *supra* note 2, at 753 (“Since 1968, virtually every presidential administration, regardless of political affiliation, has confirmed its commitment to tribal sovereignty, including the development of tribal economies and means of self-governance.”).

49. Pub. L. No. 90-284, §§ 201–701, 82 Stat. 73, 77–81 (1968) (codified as amended at 25 U.S.C. §§ 1301–41 (2000)).

50. In some respects, the ICRA constraints are *more* restrictive than the Bill of Rights. See Clinton, *supra* note 7, at 199 (noting that “the ICRA goes beyond the Bill of Rights by purporting to limit tribal court sentencing powers to a one-year term of imprisonment or a \$5,000 fine”).

51. See 25 U.S.C. § 1303 (“The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”).

52. 436 U.S. 49 (1978).

53. See *id.* at 59, 71.

54. See *id.* at 56–57.

55. See *id.* at 65–66.

action. *Tee-Hit-Ton Indians v. United States*<sup>56</sup> dramatically illustrates the first of these effects: in *Tee-Hit-Ton*, the Court held that if a tribe did not have treaty-recognized title, federal action depriving the tribe of its lands did not give rise to a takings claim.<sup>57</sup> Astonishingly, the Court derived this principle from *Johnson v. M'Intosh*, a case which—as discussed above—had affirmed Indian nations' right to possess their lands.<sup>58</sup> In *Tee-Hit-Ton*, as in a number of other cases, the Court relegated tribal claims to the mercies of the political branches: as the Court explained, its decision “leaves with Congress, where it belongs, the policy of Indian gratuities [sic] for the termination of Indian occupancy . . . rather than making compensation for its value a rigid constitutional principle.”<sup>59</sup>

On the other hand, though the Court was often unwilling to invalidate the political branches' policies concerning Indian nations, it did not act independently of those branches to reduce tribal powers. Rather, it applied canons of construction that served to minimize the harm that flowed from the policies adopted by the political branches.<sup>60</sup> As Philip Frickey has explained, “although Congress had the authority to destroy Indian rights, the assumption was that Congress would not do so lightly, and thus canons of interpretation protecting tribal interests were applied to statutory as well as treaty interpretation.”<sup>61</sup>

During the past quarter-century, however, the Court has deviated from those canons and has created a number of new federal common law limitations on tribal sovereignty.<sup>62</sup> It has held that tribes lack the power to

---

56. 348 U.S. 272 (1955).

57. *Id.* at 285; see Bryan H. Wildenthal, *Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law*, 38 TULSA L. REV. 113, 119–22 (2002) (criticizing *Tee-Hit-Ton*).

58. *Tee-Hit-Ton*, 348 U.S. at 284–85; see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 248 (1984) (“[I]n relying on the Doctrine of Discovery to justify the result [in *Tee-Hit-Ton*], the Court expanded that doctrine from a doctrine protective of aboriginal land rights to one permitting arbitrary confiscation without payment of compensation.”).

59. *Tee-Hit-Ton*, 348 U.S. at 290–91.

60. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 12 (1999); cf. Clinton, *supra* note 7, at 178 (noting, with respect to late-nineteenth century Supreme Court decisions, that “while the Court was rhetorically staking out broad claims of authority for Congress, it was not, in fact, aggressively construing federal statutes in a fashion that interfered with tribal sovereignty”).

61. See Frickey, *supra* note 60, at 12.

62. See Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 647–53 (2003) (criticizing Court's recent reductions of tribal sovereignty).

prosecute non-members for criminal offenses<sup>63</sup> and that tribes generally lack authority to regulate non-Indians' hunting and fishing on non-Indian-owned lands within a reservation,<sup>64</sup> to regulate zoning of such lands,<sup>65</sup> to tax activities conducted by nonmembers on such lands,<sup>66</sup> or to exercise legislative or adjudicative jurisdiction over many disputes involving non-tribe members that arise within reservation boundaries.<sup>67</sup> These limitations conflict with current congressional and executive branch policy: as Robert Clinton points out, "what the Court has sought to do over the past quarter century is to continue the jurisdictional assault on tribalism and tribal sovereignty undertaken in the General Allotment Act of 1887,

---

63. See *Duro v. Reina*, 495 U.S. 676, 679 (1990) (holding that tribes lacked criminal jurisdiction over non-member Indians); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding that tribal courts lacked criminal jurisdiction over non-Indians). Congress responded to the Court's decision in *Duro* by enacting legislation (known as the "*Duro* fix") that "recognize[s] and affirm[s]" tribes' "inherent power . . . to exercise criminal jurisdiction over all Indians." Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1990) (currently codified at 25 U.S.C. § 1301(2)); see also Pub. L. No. 102-137, 105 Stat. 646 (1991) (making the *Duro* fix legislation permanent). This Term, the Court has before it *United States v. Lara*, a case that presents questions relating to the effect of the *Duro* fix. See Transcript of Oral Argument, *United States v. Lara* (No. 03-107), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-107.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-107.pdf) (last visited March 14, 2004); see also Judith Resnik, *Tribes, Wars, and the Federal Courts: The Myths and the Methods of Marbury v. Madison*, 36 ARIZ. ST. L.J. 77, 121 (2004) (discussing *Lara*).

64. *Montana v. United States*, 450 U.S. 544, 557 (1981) (holding that the Crow Tribe lacked the "power . . . to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe").

65. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 414, 432-33 (1989) (White, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., announcing judgment of Court as to one set of land and dissenting from disposition as to other set of land) (concluding that the Yakima Nation lacked "the authority to zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation"); *id.* at 444 (Stevens, J., joined by O'Connor, J., concurring in judgment as to one set of land and announcing judgment of Court as to other set of land) (concluding that the Nation had authority to zone fee lands owned by nonmembers within an area of the reservation that was generally closed to the public).

66. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) (holding that tribes generally lack authority "to tax nonmember activity occurring on non-Indian fee land" within reservation).

67. *Nevada v. Hicks*, 533 U.S. 353, 355, 374 (2001) (holding that tribal court lacked "jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation"); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (holding that "tribal courts may not entertain claims against nonmembers arising out of accidents on state highways, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question").

notwithstanding subsequent express repudiation of that policy by the Indian Reorganization Act of 1934.”<sup>68</sup>

At the beginning of the twenty-first century, then, Indian nations have a complex relationship with the United States. The political branches of the federal government now support tribal self-determination and self-government, but the Supreme Court, by contrast, has placed increasing limitations on tribal powers.<sup>69</sup> It is against this background that the doctrine of tribal sovereign immunity must be considered.

### B. Tribal Sovereign Immunity

The Supreme Court has long viewed sovereign immunity as a basic feature of tribal sovereignty. Current doctrine holds that tribal sovereign immunity, like other aspects of tribal authority, can be abrogated by Congress;<sup>70</sup> but until Congress acts, tribal sovereign immunity remains.

Although judicial acknowledgment of tribal sovereignty dates back at least to the Marshall Trilogy, commentators (and the Court itself) have assumed that the Supreme Court did not specifically recognize tribal sovereign immunity until 1919 at the earliest.<sup>71</sup> However, the Court’s 1850 decision in *Parks v. Ross*<sup>72</sup> displays reasoning strikingly similar to that found in sovereign immunity doctrine. The case arose from the logistical details of the Cherokee removal, along the Trail of Tears, to lands west of the Mississippi.<sup>73</sup> John Ross—the Cherokee political leader who had brought the Cherokee Nation’s case against Georgia in the Supreme Court

---

68. Clinton, *supra* note 7, at 213.

69. See Clinton, *supra* note 7, at 117 (“[B]eginning in the late twentieth century, the Supreme Court has arrogated to itself the plenary power it previously rationalized for Congress and has begun defining federal Indian law in an exercise of judicial plenary power, similarly without any lawful justification.”).

70. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

71. See, e.g., *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) (“The doctrine is said by some of our own opinions to rest on the Court’s opinion in *Turner v. United States*, 248 U.S. 354 . . . (1919).”); David B. Jordan, Note, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes after Kiowa Tribe v. Manufacturing Technologies, Inc.*, 52 OKLA. L. REV. 489, 490 (1999) (“The first judicial recognition of sovereign immunity in Indian law occurred in 1919 in *Turner v. United States*.”). As the Court noted in *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940), the Eighth Circuit had explicitly recognized tribal sovereign immunity as early as 1895, in *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895).

72. 52 U.S. (11 How.) 362 (1850).

73. I am indebted to Gary Moulton for his graciousness in discussing with me the factual background to *Parks v. Ross*.

in 1831<sup>74</sup>—had opposed removal,<sup>75</sup> but once it became clear that removal was inevitable, Ross became the Nation’s superintendent for the journey.<sup>76</sup> Four of the many wagons required for the move were hired from Samuel Parks, a Cherokee citizen.<sup>77</sup> Samuel Parks apparently died before he could receive the balance due on the transaction, and in 1841, Ross settled the account by paying \$1,280 to George Parks, the administrator of Samuel’s estate.<sup>78</sup> A couple of years later, Parks, as administrator, sued Ross in the Circuit Court of the United States for the District of Columbia, seeking an additional sum with respect to the transaction.<sup>79</sup> The trial court granted a directed verdict to Ross, and Parks sought review in the Supreme Court.<sup>80</sup> In his argument to the Court, Parks apparently complained that the trial court had erred by viewing the case as one concerning governmental liability: the error, according to Parks, was that the court below “treated [Ross] as the head or executive of a foreign and independent nation, and held that, having received the money as such, he was responsible to the nation, and could not, *jure gentium*, be personally liable.”<sup>81</sup>

The Supreme Court followed the lower court’s lead. In affirming the grant of the directed verdict, the Court could have relied solely on principles of agency law, but it chose to invoke broader concepts of governmental obligations as well:

[A]n agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government. As regards him the rule is, that he is not responsible on any contract he may make in that capacity; and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable.<sup>82</sup>

---

74. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.)1, 2–3 (1831).

75. See Walter H. Conser, Jr., *John Ross and the Cherokee Resistance Campaign, 1833–1838*, 44 J. S. HIST. 191, 193 (1978).

76. See MOULTON, *supra* note 6, at 97; STANLEY W. HOIG, *THE CHEROKEES AND THEIR CHIEFS: IN THE WAKE OF EMPIRE* 169 (1998).

77. See *Parks*, 52 U.S. at 363.

78. See *id.* at 364.

79. *Id.* at 374. Specifically, Parks contended that the Nation had received money from the U.S. to pay for the return of the wagons to the east, and that the estate was entitled to a share of that money. *Id.*

80. *Id.* at 365, 372–73.

81. *Id.* at 368–69.

82. *Id.* at 374.

The Court emphasized that “[t]he Cherokees are in many respects a foreign and independent nation. . . . governed by their own laws and officers, chosen by themselves.”<sup>83</sup> The closing sentence of the Court’s discussion suggests that, ultimately, the Court’s affirmance rested on the view that the court below lacked jurisdiction to hear the claim against Ross:

[T]his government has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and compel them to pay the debts of their nation, either to an individual of their own nation, or a citizen of the United States.<sup>84</sup>

The *Parks* Court’s treatment of the claim against Ross fits well with David Currie’s synthesis of some of the Court’s nineteenth-century decisions concerning suits against state or federal officials:

Under traditional agency principles, an agent is liable for his own torts (as in *Osborn, Lee*, and the *Virginia Coupon Cases*), even though committed in the course of his employment; but he is not liable for breach of his employer’s contracts (as in *Jumel*), to which he is not a party.<sup>85</sup>

Although the Court’s 1919 decision in *Turner v. United States*<sup>86</sup> explicitly mentioned “the immunity of a sovereign to suit,”<sup>87</sup> the *Turner* Court arguably placed less reliance on notions of sovereign immunity than the *Parks* Court had. In the late nineteenth century, the Creek Nation

---

83. *Id.*

84. *Id.* Admittedly, the Court’s reasoning was somewhat inconsistent: if the Court concluded that the court below lacked jurisdiction to hear the claim against Ross, technically it should have vacated and remanded with instructions to dismiss for lack of jurisdiction. Nonetheless, the Court’s reference to the courts’ lack of “power . . . to arrest the public representatives or agents of Indian nations” suggests a lack of jurisdiction, and it echoes language traditionally used to describe state sovereign immunity. See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1568 (2002) (“When members of the Founding generation considered whether the Constitution exposed unconsenting states to suit, they consistently focused on states’ amenability to compulsory process, and they thought in terms that modern lawyers would associate with personal rather than subject matter jurisdiction.”).

85. David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 153 (discussing the reasoning of *In re Ayers*, 123 U.S. 443 (1887)); see also Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT’L L. REV. 521, 525–26 (2003) (discussing federal government liability in the early nineteenth century and noting that “[c]ontracts claims were generally subject to the rule that an agent who signed for a disclosed principal had no liability to perform the contract”).

86. 248 U.S. 354 (1919).

87. *Id.* at 358.

enacted a statute that permitted nation members to enclose grazing land under certain conditions.<sup>88</sup> Clarence Turner, who apparently was not a member of the Creek Nation,<sup>89</sup> created a company (whose named principals were Creek Indians) for the purpose of enclosing a huge tract of land under the Creek statute.<sup>90</sup> It appears that the statute was designed to protect tribal land from encroachment by non-tribe members, and that Turner's project came to be viewed as violating the spirit if not the letter of the statute.<sup>91</sup> As a result, three groups of Creek Indians destroyed the fence that Turner's company had built.<sup>92</sup> After the Creek Nation refused to pay compensation to Turner, he sued the Nation and the United States (as the Nation's trustee) in the Court of Claims, seeking damages.<sup>93</sup> The Court of Claims dismissed the petition, and Turner sought review in the Supreme Court.<sup>94</sup> In ruling that Turner lacked a cause of action, the Supreme Court referred to, but did not rely upon, the doctrine of sovereign immunity: "The fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace."<sup>95</sup> Although Congress had enacted legislation in 1908 that authorized the Court of Claims "to consider and adjudicate and render judgment as law and equity may require in the matter of [Turner's claim] against the Creek Nation,"<sup>96</sup> the Court held that this statute did not create a cause of action against the Nation.<sup>97</sup> In discussing the statute, the Court also noted that "[w]ithout authorization from Congress, the Nation could not . . . have been sued in any court; at

---

88. *Id.* at 355.

89. Turner's father, John E. Turner, was not a member of the Creek Nation. *Turner v. Old Homestead Co.*, 170 P. 904, 905 (Okla. 1918). Some years prior to the events described in the text, Clarence Turner had married Tookah Butler, a woman of Cherokee, Creek and non-Indian descent who had been adopted into the Creek Nation. *Turner v. United States*, 51 Ct. Cl. 125, 131 (1916); 10 GRANT FOREMAN, CHRONICLES OF OKLAHOMA 18 (No. 1, 1932), available at <http://digital.library.okstate.edu/Chronicles/v010/v010p018.html> (last visited Feb. 7, 2004).

90. *Turner*, 51 Ct. Cl. at 131.

91. As the United States later put it, "The act was intended to prevent the very thing that happened, the acquisition by outsiders and noncitizens of an immense tract of 256,000 acres, and it was this violation of the spirit and letter of the act which caused the destruction of the pasture fence." Brief for the United States at 15, *Turner v. United States*, 248 U.S. 354 (1919) (No. 33).

92. *Turner*, 248 U.S. at 356.

93. *Id.* at 357.

94. *Id.*

95. *Id.* at 358.

96. *Id.* at 356–57 (quoting Act of May 29, 1908, ch. 216, § 26, 35 Stat. 444, 457).

97. *Turner*, 248 U.S. at 358.



least without its consent”;<sup>98</sup> but this was dictum, since the 1908 statute gave such authorization.

If sovereign immunity principles furnished an alternative holding in *Parks* and dictum in *Turner*, they formed the sole basis of the Court’s 1940 holding in *United States v. United States Fidelity & Guaranty Co.* (“USF&G”).<sup>99</sup> The United States had leased to a coal company land belonging to the Choctaw and Chickasaw Nations, and USF&G had acted “as surety on a bond guaranteeing payment of the lease royalties” by the coal company.<sup>100</sup> The assignee of the coal company’s lease went into receivership and the United States filed a claim for royalties on the tribes’ behalf.<sup>101</sup> In the receivership proceeding, the court offset the tribes’ debts to the assignee coal company against that company’s debts to the tribes, resulting in a balance of some \$9,000 in the company’s favor.<sup>102</sup> Meanwhile, the United States sued USF&G in a separate action for payment on the surety bond, and the trustee of the assignee coal company intervened to seek the balance determined in the receivership proceeding.<sup>103</sup> The district court found that the judgment in the receivership proceeding barred the claim against USF&G and entitled the intervenor to a judgment for the balance.<sup>104</sup> The Court of Appeals affirmed, but the Supreme Court reversed.<sup>105</sup> The Court assumed that the receivership judgment was valid insofar as it “satisfied” the tribe’s claim against the coal company,<sup>106</sup> but the Court held the receivership judgment “void in so far as it undertakes to fix a credit against the Indian Nations” because “[t]hese Indian Nations are exempt from suit without Congressional authorization.”<sup>107</sup>

---

98. *Id.* The full quote is: “The special act of May 29, 1908, did not impose any liability upon the Creek Nation. The tribal government had been dissolved. Without authorization from Congress, the Nation could not then have been sued in any court; at least without its consent.” *Id.* It might be argued that the Court’s language suggests that the impediment to suit (absent congressional authorization) arose from the dissolution of the tribal government. Such an argument, however, seems unpersuasive, because it is not clear why dissolution would augment a tribe’s immunity from suit.

99. 309 U.S. 506 (1940).

100. *Id.* at 510.

101. *Id.*

102. *Id.*

103. *Id.* at 510–11.

104. *Id.* at 511.

105. *Id.* at 511, 516.

106. *Id.* at 511. The United States had conceded this point. *Id.*

107. *Id.* at 512 (citing *Turner v. United States*, 248 U.S. 354, 358 (1919); *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895)).

Since deciding *USF&G*, the Court has reaffirmed the doctrine of tribal sovereign immunity and has construed that doctrine broadly.<sup>108</sup> Admittedly, despite its recognition that the Constitution itself does not diminish tribal sovereign immunity—because “it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties”<sup>109</sup>—the Court has stated that Congress’s plenary power over the tribes includes the power to limit tribal immunity.<sup>110</sup> However, the Court has imposed a clear statement rule similar to that employed with respect to state immunity: No diminution of tribal immunity will be found unless Congress has clearly and unequivocally stated its intent to abrogate that immunity.<sup>111</sup>

More recently, though, members of the Court have expressed qualms about the doctrine. The Court’s recent decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*<sup>112</sup> is illustrative. Although six Justices held in *Kiowa Tribe* that a tribe’s sovereign immunity extends to suits on contracts regarding off-reservation commercial activities, those Justices went out of their way to express discomfort with tribal sovereign immunity and to suggest that Congress should consider altering the doctrine.<sup>113</sup> The Court asserted that “the doctrine of tribal immunity . . . developed almost by accident”; it noted that *Turner*’s discussion of tribal immunity “is, at best, an assumption of immunity for the sake of argument, not a reasoned statement of doctrine”; and it complained that subsequent cases upholding tribal sovereign immunity did so “with little analysis.”<sup>114</sup> The Court listed “reasons to doubt the wisdom of perpetuating the doctrine”:

At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self governance. This is evident when tribes

---

108. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (“Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.”); see generally Seielstad, *supra* note 2, at 694–99 (discussing *USF&G* and subsequent Supreme Court decisions concerning tribal sovereign immunity).

109. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991).

110. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (“This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.”).

111. See *id.* (“[A] waiver of sovereign immunity cannot be implied but must be unequivocally expressed.”) (internal quotation marks omitted).

112. 523 U.S. 751 (1998).

113. *Id.* at 756–60.

114. *Id.* at 756–57.

take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.<sup>115</sup>

Despite these concerns, the Court chose "to defer to Congress" because of the latter's superior ability "to weigh and accommodate the competing policy concerns and reliance interests."<sup>116</sup>

The *Kiowa* Court was inaccurate in assuming that *Turner* provides the earliest Supreme Court reference to principles of tribal sovereign immunity; *Parks*, decided some 70 years prior to *Turner*, indicates the force exerted by such principles in the mid-nineteenth century.<sup>117</sup> More importantly, the Court gave unduly short shrift to the policies that weigh in favor of tribal sovereign immunity; as I will discuss in Part V, the functional justifications for tribal sovereign immunity are stronger than those for state sovereign immunity. However, despite its grudging treatment of tribal immunity, and its suggestion that Congress should consider narrowing that immunity,<sup>118</sup>

---

115. *Id.* at 758 (citations omitted). The dissenting Justices also expressed distaste for tribal sovereign immunity, asserting that "[g]overnments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct." *Id.* at 766 (Stevens, J., joined by Thomas & Ginsburg, JJ., dissenting). Justice Thomas has taken a markedly different view with respect to *state* governments, voting with the majority in recent decisions expanding state sovereign immunity from private suits to enforce federal law. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

116. *Kiowa Tribe*, 523 U.S. at 759–60.

117. The Court's recognition of federal sovereign immunity occurred at roughly the same time. As Vicki Jackson explains:

The first clear reference to the sovereign immunity of the United States in an opinion for the entire Court appears to be in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821) (dictum) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.") . . . . For an earlier but more ambiguous reference, see *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335–36 (1816) . . . . Not until 1846 did the Supreme Court invoke the proposition that the United States was subject to suit only by its consent given in legislation as a basis to deny relief. See *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) . . . .

Jackson, *supra* note 85, at 523 n.5.

118. One commentator has noted that *Kiowa Tribe* suggests "that the Court views tribal sovereignty as a temporary measure which the tribes should only be able to take advantage of until they become self-sufficient enough to participate in the larger white society on equal terms with everyone else." Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 180 (2000). Tweedy considers this view inconsistent with the conventional treatment of other governmental

the Court reaffirmed that immunity and interpreted it broadly. This result stands in stark contrast to other recent Court decisions concerning tribal sovereignty. To compare the significance of *Kiowa* with that of recent decisions that narrowed other aspects of tribal sovereignty, it is necessary to consider the actual impact of tribal immunity. Accordingly, in Part III, I survey tribal immunity law from a number of tribes.

### III. THE CURRENT LANDSCAPE OF REMEDIES AGAINST TRIBES

This Section briefly reviews a number of types of possible claims against tribes, and discusses the fora and remedies available for those claims.<sup>119</sup> This survey yields two conclusions. First, numerous tribes provide some recourse to claimants with civil rights, tort, employment, or contract claims, though the tribes may limit the remedies available on those claims. Second, because many tribes limit their waivers of immunity to suits in their own courts, a major effect of tribal immunity is to channel litigation against tribal governments to tribal courts.<sup>120</sup>

Under some circumstances, tribal entities may be sued in non-tribal courts. A tribe can waive immunity from suit<sup>121</sup>; moreover, under current doctrine, Congress has the power to abrogate tribal immunity from suit, though it has rarely done so in recent years.<sup>122</sup> Even where no waiver or abrogation has occurred, a plaintiff might seek injunctive relief against

---

immunities: “[I]t is not as though we expect other quasi-sovereigns, such as states, to outgrow sovereign immunity once they have a sufficient tax base.” *Id.* at 179.

119. In this section, I rely largely on tribal court decisions published in the Indian Law Reporter and on tribal constitutions, codes and judicial decisions made available on the National Tribal Justice Resource Center’s website, <http://www.tribalresourcecenter.org/courts/>. These sources may not provide a representative sampling of tribal law in general. See Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 490 (1998) (noting the “inherent risk in relying on self-selected case reports”). However, the cases, statutes and constitutional provisions discussed in the text do provide a sense of the current approach of at least some tribes.

120. Cf. Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 317 (2000) (“Sovereign immunity is best understood as the power of a government to define the forum, procedure, and limits to be placed upon suits against itself.”).

121. *E.g.*, *C&L Enters., v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 423 (2001) (holding that tribe could be sued in state court to enforce an arbitration award, because tribe had entered into contract containing arbitration and choice-of-law clauses that waived tribe’s immunity from suit).

122. See WILKINS & LOMAWAIMA, *supra* note 2, at 233–35 (discussing abrogation of tribal immunity with respect to “depredation claims” in the late eighteenth to early twentieth centuries); *id.* at 235–36 (discussing the McCarran Amendment’s abrogation, in 1952, of tribal immunity with respect to water rights litigation); *id.* at 236 (discussing Eighth Circuit’s holding that the Resource Conservation and Recovery Act of 1976 abrogates tribal immunity).

tribal officials under an *Ex parte* Young theory.<sup>123</sup> However, to obtain relief against a tribal entity, the plaintiff not only must surmount tribal immunity, but also must possess a cause of action. In many instances, the latter requirement will not be met: the Bill of Rights does not bind Indian tribes,<sup>124</sup> tribes are not among the potential defendants in actions under Section 1983,<sup>125</sup> and the Indian Civil Rights Act does not (outside of the habeas corpus context) give rise to a cause of action in non-tribal court.<sup>126</sup>

Thus, many remedies are obtainable against a tribe in tribal court but not elsewhere. As noted, outside the habeas context, civil rights claims against a tribe can generally be brought only in tribal court.<sup>127</sup> Some tribal courts have held that the Indian Civil Rights Act creates a cause of action in tribal court.<sup>128</sup> In other tribes, tribal statutory or constitutional provisions have incorporated the ICRA provisions,<sup>129</sup> and some tribes have created a cause of action for ICRA violations. In still other tribes, the tribal constitution or statutory law provides protections similar to the ICRA,<sup>130</sup>

123. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (citing *Young* with a “cf.” signal and stating that “[a]s an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe’s immunity from suit”); *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 954 (9th Cir. 2000) (holding that “suits for prospective injunctive relief are permissible against tribal officers under the *Ex Parte* Young framework”).

124. See *Talton v. Mayes*, 163 U.S. 376, 382–83 (1896).

125. See *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1887, 1892 (2003) (“[T]he parties agree, and we will assume for purposes of this opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983.”); *R.J. Williams Co. v. Fort Belknap Hous. Auth.*, 719 F.2d 979, 982 (9th Cir. 1983) (“As the purpose of 42 U.S.C. § 1983 is to enforce the provisions of the fourteenth amendment, it follows that actions taken under color of tribal law are beyond the reach of § 1983 . . . .”) (citation omitted).

126. See *Martinez*, 436 U.S. at 70.

127. See *supra* notes 51–55 and accompanying text.

128. See, e.g., *Palencia v. Pojoaque Gaming, Inc.*, 28 Indian L. Rep. 6149, 6151–53 (Pueblo of Pojoaque Tribal Ct. 2001) (finding that tribal gaming enterprise’s security staff violated ICRA’s due process and search and seizure provisions, and awarding damages).

129. See, e.g., CONST. AND BY-LAWS OF THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, art. III, § 3(k) (“The Tribe shall provide to all persons within its jurisdiction the rights guaranteed by the Indian Civil Rights Act of 1968.”), available at <http://www.grandronde.org/Legal/Docs/Constitution.pdf> (last visited Feb. 28, 2004); 1 MASHANTUCKET PEQUOT TRIBAL LAWS tit. 1, ch. 3, § 10(a) (2000) (“The Indian Civil Rights Act, codified at 25 U.S.C. § 1302, and all amendments thereto, is hereby adopted as Tribal law and shall apply in the Tribal Court.”), available at <http://www.tribalresourcecenter.org/ccfolder/MPEQUOT1.HTM> (last updated 2000).

130. See, e.g., COLVILLE TRIBAL LAW & ORDER CODE § 1-5-2 (1988) (setting forth civil rights provisions similar to those in the ICRA), available at [http://www.tribalresourcecenter.org/ccfolder/colville\\_lawandorder\\_CHPT1-5.html](http://www.tribalresourcecenter.org/ccfolder/colville_lawandorder_CHPT1-5.html) (last visited Feb. 28, 2004); CONST. OF THE HO-CHUNK NATION art. X (same), available at [http://www.tribalresourcecenter.org/ccfolder/hochunk\\_const.htm](http://www.tribalresourcecenter.org/ccfolder/hochunk_const.htm) (last visited Feb. 28, 2004); see Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and*

with the result that the tribal court may grant relief under the tribal-law provision without deciding whether relief is also available under the ICRA.

Although not all tribal courts find that Congress abrogated tribal immunity from suit in tribal court under the ICRA,<sup>131</sup> this question is often academic because many tribes have, to varying degrees, waived immunity from suit on civil rights claims.<sup>132</sup> Some tribes have authorized damages claims, subject to a damages cap or to the limits of the tribe's liability insurance.<sup>133</sup> Many tribes have authorized suit against tribal officials for declaratory and injunctive relief with respect to claims under civil rights laws or the tribal constitution.<sup>134</sup> The relief awarded against tribal officials

---

*Civil Rights*, 70 DENV. U. L. REV. 359, 382–83 (1993) (“Many tribal constitutions contain bills of rights and, as indicated in the preceding section, a number of tribes have codified civil rights laws that grant tribal members due process and equal protection rights.”) (footnotes omitted).

131. See *Limas*, *supra* note 130, at 380 (“Tribal courts disagree on whether the ICRA itself waives sovereign immunity of tribes in tribal courts for actions alleging violations of that Act.”); *Waggoner v. Muscogee (Creek) Nation*, Div. of Health Admin., 7 Okla. Trib. 59, 2000 WL 33976301 (Muscogee (Cr.) D. Ct. 2000) (holding that ICRA did not abrogate tribal immunity with respect to non-habeas claims, but that tribe had waived its immunity with respect to declaratory and injunctive relief under the ICRA), *appeal dismissed*, 7 Okla. Trib. 154, 2000 WL 33976528 (Muscogee (Cr.) 2000).

132. See, e.g., *Terry-Carpenter v. Las Vegas Paiute Tribal Council*, 29 Indian L. Rep. 6041, 6046 (Las Vegas Paiute Ct. App. 2002) (holding that ICRA did not abrogate tribal immunity from suit in tribal court but that tribe had waived its immunity with respect to suits in tribal court to enforce the procedural requirements of tribe's membership ordinance, and taking a broad view of what constitutes a “procedural” challenge for purposes of the waiver of immunity), *reh'g denied & opinion clarified*, *Terry-Carpenter v. Las Vegas Paiute Tribal Council*, 29 Indian L. Rep. 6059 (Las Vegas Paiute Ct. App. 2002); see also Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 22 (1996) (with respect to ICRA claims, noting that “[g]enerally, but not always, tribal courts have found a waiver of sovereign immunity, explicitly or implicitly, in the tribal constitution or the holding of *Santa Clara Pueblo*”).

133. See, e.g., COLVILLE TRIBAL LAW & ORDER CODE § 1-5-8 (providing that to the extent that a claim in tribal court under tribal civil rights provisions is covered by the tribe's liability insurance, “suit may be brought for damages up to the full available amount of the coverage provided in the insurance policy”); 1 MASHANTUCKET PEQUOT TRIBAL LAWS tit. 1, ch. 3, § 11 (waiving sovereign immunity with respect to claims asserting ICRA violations by tribal police on tribal lands, but capping damages at \$500,000 per incident, barring punitive damages, and limiting pain and suffering damages to 50 percent of economic damages).

134. See, e.g., COLVILLE TRIBAL LAW AND ORDER CODE §§ 1-5-3 to 1-5-5 (authorizing suits in tribal court for declaratory and/or injunctive relief against tribal officials and employees to enforce tribal civil rights provisions); CONST. OF THE HO-CHUNK NATION, art. XII, § 2. (“Officials and employees of the Ho-Chunk Nation who act beyond the scope of their duties or authority shall be subject to suit in equity only for declaratory and non-monetary injunctive relief in Tribal Court ... for purposes of enforcing ... this constitution or other applicable laws.”); *Ho-Chunk Nation Legislature v. Ho-Chunk Nation Gen. Council*, 28 Indian L. Rep. 6168, 6171–72 (Ho-Chunk Nation Trial Ct. June 22, 2001) (stating that Ho-Chunk Nation officials may be sued in tribal court for injunctive or declaratory relief for violations of tribal law); *Gourd v. Robertson*, 28 Indian L. Rep. 6047, 6048 (Spirit Lake Tribal Ct. 2001) (“[A]

under such provisions can be significant.<sup>135</sup> Moreover, some tribal courts have demonstrated their willingness to enforce injunctive relief by means of monetary contempt sanctions against tribal governmental defendants.<sup>136</sup> A plaintiff might also sue a tribal official for damages in his or her individual capacity; a number of tribes permit such claims, subject to a qualified immunity defense.<sup>137</sup>

Tribal approaches to tort claims also vary. With respect to tort claims arising out of a tribe's activities in implementing certain federal programs, a plaintiff may be able to recover damages from the United States under the Federal Tort Claims Act ("FTCA").<sup>138</sup> With respect to claims outside the

---

tribal official is not immune from suit for declaratory and injunctive relief for an alleged violation of the Indian Civil Rights Act."); *Standing Rock Group for Accountability v. Defender*, 29 Indian L. Rep. 6014, 6016 (Standing Rock Sioux Tribal Ct. 2001) ("Sovereign immunity . . . does not bar a suit for equitable or injunctive relief against an Indian tribe or tribal official who exceeds his authority under tribal law and in so doing violates the statutory or constitutional rights of a tribal member."); *Rave v. Reynolds*, 23 Indian L. Rep. 6150, 6163-64 (Winnebago Sup. Ct. 1996) (in litigation concerning election disputes, holding that Tribal Code authorized suit for injunctive and declaratory relief against tribal officials); *cf. McCarthy*, *supra* note 119, at 513 ("Most tribal courts have found the ICRA to be enforceable against tribal officials but not against the sovereign itself . . ."); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 339 (1998) (noting that "[s]ome tribes . . . specifically waive sovereign immunity for Indian Civil Rights Act cases, but limit that waiver to injunctive or declaratory relief").

135. *See, e.g., Lowe v. Ho-Chunk Nation Legislature Members*, 29 Indian L. Rep. 6076, 6077 (Ho-Chunk Nation Trial Ct. 2001) (in redistricting litigation, setting a deadline for the legislature to "submit a different final redistricting/reapportionment proposal to the Court"); *Standing Rock Group for Accountability*, 29 Indian L. Rep. at 6018 (in litigation concerning the use of some \$2 million in tribal monies, enjoining tribal district officials "from expending any of the money . . . until such time as [they] submit[] a detailed budget to the Tribal Council detailing specific proposed expenditures and that budget is approved by the Council").

136. *See, e.g., Smith v. Beard*, 28 Indian L. Rep. 6006, 6009, 6014 (Ho-Chunk Nation Trial Ct. 2000) (awarding the plaintiff some \$16,000, and explaining that the court's order to place plaintiff on administrative leave with pay was an "ongoing contempt sanction to the Nation for not obeying the order to reinstate" the plaintiff), *reconsideration denied*, 28 Indian L. Rep. 6015 (Ho-Chunk Nation Trial Ct. 2000, *aff'd*, 28 Indian L. Rep. 6044 (Ho-Chunk Nation Supreme Ct. 2001), *reconsideration denied*, 28 Indian L. Rep. 6120 (Ho-Chunk Nation Supreme Ct. 2001)); *cf. In re Hardenburgh*, 28 Indian L. Rep. 6094, 6095 (Little River Band of Ottawa Indians Tribal Ct. App. 2000) (setting a deadline for tribal election board to resolve election disputes, and stating court's intention to "impose a fifty-dollar (\$50.00) fine on each individual Board member for each calendar day" of delay).

137. *See, e.g., Gourd*, 28 Indian L. Rep. at 6049 (holding that plaintiff could recover damages on ICRA claim against general manager of tribal casino if plaintiff showed that the defendant "violated a clearly-established right of the plaintiff"). I have not been able to find data on the extent to which tribes indemnify tribal officials with respect to such claims.

138. *See* Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. §§ 450-450n & 458-458e; 25 U.S.C. § 450f(d) (claims arising from certain health services activities); 25 U.S.C. § 450f note (claims arising from tribal performance of an agreement under the ISDEAA); 25 U.S.C. § 2804(a) (authorizing Secretary of Interior to enter into agreements



scope of the FTCA, many tribes obtain liability insurance, with the result that a plaintiff may recover damages up to the amount of the liability coverage.<sup>139</sup> Other tribes have set a cap on damages, or have limited the amount of noneconomic damages to some multiple of economic damages.<sup>140</sup>

As tribal governments and tribally-owned enterprises grow, the potential for employment-related claims increases.<sup>141</sup> A number of tribes have established administrative processes for the resolution of such claims.

---

for the use of tribal personnel or facilities in law enforcement in Indian country); 25 U.S.C. § 2804(f) (providing that tribal personnel acting under authority granted under Section 2804(a) are considered employees of the Department of the Interior for Federal Tort Claims Act purposes); *see generally* UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL TORT CLAIMS ACT: ISSUES AFFECTING COVERAGE FOR TRIBAL SELF-DETERMINATION CONTRACTS (July 2000).

139. *See, e.g.*, 1 MASHANTUCKET PEQUOT TRIBAL LAWS tit. 4, ch. 1, §§ 4, 5. 9 (200) (waiving tribal gaming enterprise's immunity from suit, up to the limits of the applicable liability insurance, for tort claims arising from negligent acts, but barring punitive damages and limiting noneconomic damages to 50 percent of economic damages), *available at* <http://www.tribalresourcecenter.org/ccfolder/MPEQUOT1.HTM> (last updated 2000). Congress recently directed the Secretary of the Interior to conduct "a comprehensive survey of the degree, type, and adequacy of liability insurance coverage of Indian tribes," in order "to facilitate relief for a person who is injured as a result of an official action of a tribal government." Indian Tribal Tort Claims and Risk Management Act of 1998, Pub. L. No. 105-277, Div. A, § 101(e), 112 Stat. 2681-335 to 2681-337 (reprinted at 25 U.S.C. § 450f note); Seielstad, *supra* note 2, at 725-26 (discussing this provision). The survey, which was released in July 2000, was less comprehensive than originally intended; responses were provided only as to roughly two in five tribes, and most tribal respondents did not submit complete claims history information. *See* BUREAU OF INDIAN AFFAIRS, SURVEY OF LIABILITY INSURANCE COVERAGE 5-6 (July 2000) (noting that 144 tribes responded to the survey and that the BIA received responses from insurance carriers with respect to an additional sixty-five tribes). Of the tribes for which information was provided, eighty-six percent had insurance coverage. *See id.* at 7. The other fourteen percent appear to be mostly small tribes with no gaming operations. *See id.* at 7-8.

140. *See* 1 MASHANTUCKET PEQUOT TRIBAL LAWS, tit. 12, ch. 1, § 2 (waiving tribe's sovereign immunity for claims in tribal court regarding "a tort of the Tribe or its agents, servants, or employees acting within the scope of their employment," but providing that only compensatory damages are available for personal injury claims and limiting noneconomic damages for personal injury claims to fifty percent of economic damages).

141. Limas, *supra* note 130, at 362-64. Both Title VII and the Americans with Disabilities Act expressly exempt tribal employers from their scope. *See* 42 U.S.C. § 2000e(b) (exemption of tribal government employers from Title VII); 42 U.S.C. § 12111(5)(B) (exemption of tribal governments from employment provisions of ADA); *see also* Mitchell Peterson, Student Article, *The Applicability of Federal Employment Law to Indian Tribes*, 47 S.D. L. REV. 631, 657 (2002) (arguing, with respect to federal employment statutes, that "[i]f tribal sovereignty is impacted, infringed, or implicitly divested by application of the statute, then the statute should not apply to tribes unless Congress has clearly expressed such intent").



Judicial review of administrative determinations is often available.<sup>142</sup> Relief may include reinstatement and, sometimes, the award of back pay.<sup>143</sup>

Contract claims against tribes may be subject to varying modes of dispute resolution.<sup>144</sup> As noted above, a tribe may waive its immunity by contract, and may permit suit in tribal or non-tribal courts. The Mashantucket Pequot Tribe, for example, has waived its immunity from suit in tribal court on all claims concerning contracts duly executed by the Tribe, unless the contract expressly states otherwise.<sup>145</sup>

In sum, a number of tribes provide remedies for civil rights, tort and contract claims against tribal government defendants. Not all tribes provide full remedies;<sup>146</sup> however, in assessing the current availability of remedies

---

142. See, e.g., *In re Cathy Dupuis*, 28 Indian L. Rep. 6078, 6079 (Confederated Salish and Kootenai Tribes Ct. App. 2001) (remanding with directions to the trial court to “carefully and thoroughly make a review of the administrative action to determine whether the policies and procedures were followed and that the decision was not arbitrary and capricious”); CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON TRIBAL CODE § 255.5(d)(8) (providing that tribal court may reverse administrative decision regarding employment dispute if decision violates tribal or federal law, is “arbitrary, capricious, [or] an abuse of discretion,” or “[i]s not supported by substantial evidence”), available at <http://www.grandronde.org/Legal/Docs/EmployActionReview.pdf> (last visited Feb. 28, 2004); *Kagigebi v. Decorah*, 29 Indian L. Rep. 6081, 6086 (Ho-Chunk Nation Trial Ct. 2002) (holding that disciplinary action against an employee was “arbitrary, capricious and an abuse of discretion,” and ordering the Nation “to delete the discipline from Mr. Kagigebi’s work record and to repay him for the improper one-day suspension plus interest at five percent . . . from the date of this Judgment”); LITTLE RIVER BAND OF OTTAWA INDIANS ORDINANCES AND REGULATIONS ch. 600, §§ 8.3, 8.6 (providing for tribal court review of administrative resolution of employee grievances); *Bialik v. Little River Gaming Comm’n*, 28 Indian L. Rep. 6160, 6161 (Little River Band of Ottawa Indians Tribal Ct. 2001) (holding that tribe’s adoption of personnel policy waived tribal gaming commission’s sovereign immunity with respect to tribal court review of employee grievances); *Gwin v. Four Bears Casino and Lodge*, 30 Indian L. Rep. 6120, 6121 (Three Affiliated Tribes of the Fort Berthold Reservation D. Ct. 2003) (holding that tribal casino “waived its immunity from suit . . . by enacting personnel policies and procedures that enable this Court to review the decisions of its third party administrators in termination of employment matters”).

143. E.g., CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON TRIBAL CODE § 255.5(c)(3) (2001) (providing that remedies under tribe’s Employment Action Review Ordinance “shall be limited . . . to reinstatement, payment of back pay, and payment of other back Employee Benefits”).

144. Certain contracts that encumber tribal lands are now required either to provide for remedies against the tribe in the event of breach or to disclose the tribe’s policy with respect to the assertion of sovereign immunity. See 25 U.S.C. § 81(d)(2); Seielstad, *supra* note 2, at 722–25 (discussing this provision).

145. See, e.g., 1 MASHANTUCKET PEQUOT TRIBAL LAWS tit. 12, ch. 1, §§ 1(d)(1) 3.

146. In 2000, the American Indian Law Center published the results of a survey concerning tribal courts. See AMERICAN INDIAN LAW CENTER, INC., SURVEY OF TRIBAL JUSTICE SYSTEMS AND COURTS OF INDIAN OFFENSES (May 2000) [hereinafter AILC SURVEY]. Among many other questions, the survey inquired about tribal sovereign immunity. Thirty-six respondents stated that their tribes had waived immunity, while fifty-seven respondents stated that their tribe had

against tribal defendants, it is useful to keep in mind that remedies against non-tribal governments are likewise far from complete.

#### IV. THE CURRENT LANDSCAPE OF REMEDIES AGAINST NON-TRIBAL GOVERNMENTS

Proponents of restrictions on tribal immunity often contend that non-tribal governments have abjured immunity, and that tribes should do so as well. This section briefly surveys the landscape of remedies against non-tribal governments in the United States. The availability of remedies against the United States has varied over time; as remedies against the

---

not. *See id.* app. D, Descriptive Statistics, at 30. (My discussion of the survey results here and in notes 222 and 225 lists the number of respondents whose answers were coded in a way that matched the options in the relevant survey question. The survey results also include a handful of responses that were coded in categories other than the options given in the question. *See, e.g., id.* app. D, at 30 (responses coded for the question “Has your tribe waived its immunity from suit in court?” included fifty-seven “N” responses, thirty-six “Y” responses, one “B” response, two “9” responses, and three “7” responses). I am omitting the responses that were coded in those unexplained categories.) Of the respondents reporting a waiver of tribal immunity, one reported a “general waiver,” fifteen reported “a limited waiver . . . for tort claims against the tribe,” eight reported “a limited waiver . . . for civil rights claims against the tribe,” twenty-four reported “a limited waiver . . . for specific business activities,” fifteen reported “a limited waiver . . . as to special tribal public agencies,” thirteen reported “a limited waiver . . . as to tribally-owned business enterprises,” and seven reported “a limited waiver” as to “other.” *Id.* app. D at 30–31. Twenty-two respondents reported that the waiver was “specific to . . . tribal court,” five reported that it was “specific to . . . federal court,” and two reported that it was “specific to . . . state court.” *Id.* app. D at 31.

It is questionable whether these results provide an accurate account of the remedies available with respect to the responding tribes. The survey questions on sovereign immunity were ambiguous, in that they did not distinguish among types of remedies. Thus, for example, in response to the question “Has your tribe waived its immunity from suit in court?,” a respondent might reasonably have answered “No” even if damages, injunctions and declaratory relief were available against tribal officials. *Cf. id.* at 20 (noting that “the question of waiver as posed in the questionnaire may not have been sufficiently clear to elicit accurate information”).

It is even less likely that the survey results provide a representative picture of tribal government liability more generally. The survey’s usefulness is limited by the low response rate; the survey was sent to all federally recognized tribes, but only 134 tribes responded to any part of the survey. *See id.* at 6–7. Although the respondents were “generally representative of all tribes in terms of . . . population size,” *id.* at 7, some tribes with greater financial resources may have chosen not to respond to the survey due to concerns that the survey responses might be used as a basis for altering the allocation of funding by the Bureau of Indian Affairs. *See id.* at 7 (“Of the tribes not responding, a number informally expressed reluctance to divulge information about tribal programs and resources because of the widely-discussed possibility of changing the TPA allocation and converting to a ‘needs-based’ allocation.”). To the extent that tribes with greater economic resources are likely to have better-funded courts and to provide more extensive waivers of immunity, self-selection bias may have skewed the survey’s sovereign immunity results.

federal government gradually expanded, relief against individual federal officials became harder to obtain. With respect to both the federal and state governments, there continue to exist significant limits on governmental liability.

The United States' first formal waiver of immunity occurred in the mid-nineteenth century; but even before that, significant remedies existed for those harmed by government action. As Vicki Jackson recently noted, remedies against federal government officials included writs of habeas corpus, writs of mandamus, and injunctions; moreover, a tort claimant could seek damages against an official in his individual capacity.<sup>147</sup> By mid-century, the government's need to facilitate dealings with government contractors led to the creation of the Court of Claims and to waivers of federal immunity with respect to contract, statutory and regulatory claims (though not tort claims).<sup>148</sup> In 1946, the United States enacted a general tort claims statute,<sup>149</sup> and in 1976, Congress enacted the waiver of federal sovereign immunity currently contained in the Administrative Procedures Act ("APA").<sup>150</sup>

The expansion of remedies against the federal government is not complete, and it is not an unalloyed gain for those harmed by government action. Even today, the federal government retains noteworthy limitations on its liability.<sup>151</sup> The Federal Tort Claims Act ("FTCA"), for example, excludes recovery for claims arising from discretionary activities<sup>152</sup> or from

---

147. See Jackson, *supra* note 85, at 524–25.

148. See Judith Resnik, *Of Courts, Agencies, and the Court of Federal Claims: Fortunately Outliving One's Anomalous Character*, 71 GEO. WASH. L. REV. 798, 801 (2003) (discussing the origins of the Court of Federal Claims); Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 607–08 (2003) (discussing the Tucker Act, 24 Stat. 505 (1887), and its predecessors).

149. See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812, 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b), 2671–2680 (1994 & Supp. IV 1998)); see also Matthew L. Zabel, *Advisory Juries and Their Use and Misuse in Federal Tort Claims Act Cases*, 2003 BYU L. REV. 185, 190–91 (discussing enactment of Federal Tort Claims Act).

150. See Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (1976) (codified at 5 U.S.C. § 702 (1999)); see Sisk, *supra* note 148, at 615–16 (explaining that prior to the 1976 amendment of the APA, a claim that a federal official “abused discretion, reached an arbitrary and capricious decision, or made a procedural error” was barred by federal sovereign immunity unless the official was exceeding the scope of his or her authority or was violating the Constitution).

151. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 619–30 (4th ed. 2003) (discussing limits on federal government's liability under Federal Tort Claims Act).

152. See 28 U.S.C. § 2680(a) (2000) (excluding claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be

many intentional torts,<sup>153</sup> and it bars the award of punitive damages.<sup>154</sup> In addition, the Court has interpreted the FTCA to exclude claims by members of the Armed Services for injuries arising out of or occurring in the course of military service.<sup>155</sup> Meanwhile, the provision of remedies directly against the government has been a factor in the Court's limitation of remedies against federal officials in their individual capacities.<sup>156</sup>

State governments appear to have been slow to limit governmental immunity. When Robert Leflar and Benjamin Kantrowitz surveyed state governments' tort liability in the 1950s, they found that most states were more restrictive of government liability than the United States.<sup>157</sup> Grouping the states into rough categories based on the availability of tort damages against states and state agencies, Leflar and Kantrowitz reported that 23 states "seldom" or "almost never" accepted tort responsibility, that 12 states "occasionally" did so, and that only 13 states did so in "most" or "substantially all" instances.<sup>158</sup> The authors noted the gradual nature of change with respect to state liability: As they explained, "[p]ractically every one of the states which now affords relief generally to persons injured by its torts did away with its sovereign immunity only a little bit at a time."<sup>159</sup>

In the half-century since the Leflar and Kantrowitz survey,<sup>160</sup> the states have appreciably expanded their waivers of immunity.<sup>161</sup> Nonetheless,

---

abused"); see also Jackson, *supra* note 85, at 564 (discussing the "discretionary function" exclusion).

153. See 28 U.S.C. § 2680(h) (2000) (excluding claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights," but not excluding claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" by federal law enforcement officers).

154. See 28 U.S.C. § 2674 (2000); see also Zabel, *supra* note 149, at 192–93 (discussing limitations placed on actions under the Federal Tort Claims Act).

155. See *Feres v. United States*, 340 U.S. 135, 146 (1950).

156. See Jackson, *supra* note 85, at 564 ("As Congress has expanded the arena of government liability for tort (as in contracts and takings), so have Congress and the Court narrowed the availability of actions against federal government employees.").

157. Robert A. Leflar & Benjamin E. Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363, 1407 (1954) ("[T]he states generally have not undertaken tort liability, [and] on the whole they do not even approach the position of the national government under the Federal Tort Claims Act.").

158. *Id.* This tally includes only 48 states because Alaska and Hawaii were not admitted to the Union until 1959.

159. *Id.* at 1409.

160. My discussion of the current landscape of state and local immunities draws upon the survey of state and local immunity in 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT (2d ed. 1992) [hereinafter CIVIL ACTIONS].

important restrictions remain.<sup>162</sup> State constitutions contain explicit guarantees of state sovereign immunity in Alabama,<sup>163</sup> Arkansas<sup>164</sup> and West Virginia.<sup>165</sup> Even in states which have appreciably reduced the scope of state immunity, states ordinarily retain immunity with respect to government functions such as legislative, judicial and policymaking activities.<sup>166</sup> States that have waived tort immunity often carve out categories of activities for which they cannot be sued.<sup>167</sup> Many states limit

161. See Lauren K. Robel, *Sovereignty and Democracy: The States' Obligations to Their Citizens Under Federal Statutory Law*, 78 IND. L.J. 543, 545 (2003) (noting that "the last half century has seen a marked abandonment, both judicial and legislative, of sovereign immunity doctrines" in the states).

162. See Amelia A. Fogleman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1377-78 (noting that a number of states limit the type and/or amount of damages available against state government defendants); Schlosser, *supra* note 120, at 337 ("[M]ost state tort claims acts expressly immunize the State from claims arising from normal governmental functions and exercises of discretion.").

163. See ALA. CONST. art. I, § 14 (providing "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity"); *Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Health Servs. Found., P.C.*, 2003 WL 22160893, at \*12 (Ala. Sept. 19, 2003) (state government lacks authority to waive state sovereign immunity).

164. See ARK. CONST. art. 5, § 20 ("The State of Arkansas shall never be made defendant in any of her courts."); *Smith v. Denton*, 895 S.W.2d 550, 555 (Ark. 1995) ("The Arkansas Constitution prohibits awards of damages in lawsuits against the State of Arkansas and its institutions.") (citation omitted).

165. See W. VA. CONST. art. 6, § 35:

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof or any municipality therein, or any officer, agent or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

See also *Shaffer v. Stanley*, 2003 WL 22850002, at [] (W. Va. Nov. 26, 2003) (state has constitutional immunity from damages suits, except that suit can be brought on claims covered by state's liability insurance); CIVIL ACTIONS, *supra* note 160, § 1.9, at 31 (discussing the Alabama, Arkansas, and West Virginia provisions).

166. See, e.g., ARIZ. REV. STAT. ANN. § 12-820.01 (West 2003) (state or state subdivision "shall not be liable for acts and omissions of its employees constituting either . . . [t]he exercise of a judicial or legislative function [or] [t]he exercise of an administrative function involving the determination of fundamental governmental policy"). As one treatise states:

Although the common-law doctrines of sovereign and governmental immunity have been judicially abrogated in many jurisdictions, the courts which removed this obstacle to governmental tort liability generally recognized that immunity would remain for functions that are essentially governmental in nature, such as judicial, legislative, quasi-judicial, quasi-legislative, and executive functions involving a high degree of discretion . . . . In addition, government tort claims acts often contain exceptions to tort liability for governmental or discretionary functions.

CIVIL ACTIONS, *supra* note 160, § 2:1, at 83-84.

167. See, e.g., IDAHO CODE §§ 6-904, 6-904A, 6-904B (Michie 1998) (excluding governmental liability for certain types of actions); IND. CODE § 34-13-3-3 (1976) (excluding

the amount of damages recoverable against a state defendant,<sup>168</sup> and many bar the imposition of punitive damages against a state.<sup>169</sup> Recent Supreme Court decisions protect states from abrogation of their immunity from suit under many federal laws, and only a few states have waived their immunity from such suits.<sup>170</sup>

This survey, then, discloses a mixed picture. As Lauren Robel recently noted:

---

from scope of government liability claims arising from certain activities, including “[t]he performance of a discretionary function”); MINN. STAT. § 3.736(3) (1997) (listing exclusions from state liability, including “loss caused by the performance or failure to perform a discretionary duty”); MISS. CODE ANN. § 11-46-9 (1972) (listing exemptions from tort liability for state and local governments and their employees); N.J. STAT. ANN. § 59:2-3 (West) (1992) (exempting state and local governments from liability for tort claims arising from legislative or judicial acts or “from the exercise of judgment or discretion”); S.C. CODE ANN. § 15-78-60 (Law. Co-op. 2003) (exempting state and local governments from liability for tort claims arising from, *inter alia*, legislative or judicial acts or “the exercise of discretion or judgment”).

168. *See, e.g.*, COLO. REV. STAT. § 24-10-114 (2003) (setting presumptive cap on tort damages against state or local governments of \$150,000 per person and \$600,000 per occurrence, and providing that these limits may be raised by resolution or by legislative action in a particular case); IDAHO CODE § 6-926 (Michie 1998) (capping state and local governmental liability for “personal injury, death, or property damage” at \$500,000 per occurrence unless liability insurance has higher coverage limit); IND. CODE § 34-13-3-4 (1976) (capping governmental tort liability at \$300,000 to 700,000 per person depending on when claim accrues, and imposing overall \$5,000,000 cap per occurrence); MINN. STAT. § 3.736(4)(c) (2003) (capping state tort liability at \$1,000,000 per occurrence for claims arising in 2000 or later); MISS. CODE ANN. § 11-46-15(1)(c) (1972) (capping tort liability for state and local governments and their employees at \$500,000 per occurrence for claims arising on or after July 1, 2001); MO. REV. STAT. § 537.610 (2000) (capping tort liability for state and “public entities” at \$2,000,000 per occurrence and \$300,000 per person, and providing for those caps to be indexed for inflation); N.J. STAT. ANN. § 59:9-2 (West 1992) (limiting the availability of damages for pain and suffering in tort suits against state or local governments or their employees).

169. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-820.04 (West 2003) (“Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages.”); CAL. GOV’T CODE § 818 (West 1995) (barring award of exemplary damages against state or local government); COLO. REV. STAT. § 24-10-114 (2003) (barring award of punitive damages against state or local governments); IDAHO CODE § 6-918 (Michie 1998) (“Governmental entities and their employees shall not be liable for punitive damages on any claim allowed” under state tort claims act); IND. CODE § 34-13-3-4 (2003) (“A governmental entity or an employee of an governmental entity acting within the scope of employment is not liable for punitive damages” under state tort claims statute); MISS. CODE ANN. § 11-46-15(2) (1972) (barring punitive damages and prejudgment interest with respect to tort claims against state or local governments and their employees); MO. REV. STAT. § 537.610(3) (2000) (barring punitive damages in tort suits against a “public entity”); N.J. STAT. ANN. § 59:9-2(c) (West 1992) (barring punitive damages in tort suits against state or local governments).

170. *See* Robel, *supra* note 161, at 558 n.97 (discussing waivers by Minnesota and North Carolina).

Abrogation of immunity has not typically resulted in full liability for all governmental violations of state law duties. Indeed . . . there are reasons to calibrate governmental liability in order to assure that discretionary decisions are not overdeterred and that the state can plan for its fiscal responsibility. Blanket waivers of all immunity for all functions are not common. But blanket assertions of immunity are even rarer, for the political realities of turning away injured citizens are not appealing to many elected officials, both judicial and legislative.<sup>171</sup>

If the political realities in the states weigh in favor of expanded government liability, so too do the political realities facing tribal governments. The next part assesses the likely impact of those realities on tribal use of sovereign immunity.

#### V. ASSESSMENT AND PREDICTIONS CONCERNING TRIBAL SOVEREIGN IMMUNITY

An irony of tribal sovereign immunity is that tribal governments have better justifications for asserting sovereign immunity than the state or federal governments do, but also more powerful reasons to waive it. Standard policy arguments for sovereign immunity—such as fiscal concerns or governmental “dignity”—are more likely to ring true with respect to tribal than nontribal governments.<sup>172</sup> However, tribes face strong pressures to waive immunity. Tribes themselves have experienced—through their dealings with the federal and state governments—the effects of governmental denials of responsibility. More immediately, the plenary power doctrine places tribes in a politically vulnerable position: Aggressive tribal assertions of sovereign immunity may be adduced to support measures to limit tribal immunity or tribal governmental power more generally. Thus, it appears very likely that the tribes themselves will continue to extend the scope of remedies against tribal governments, particularly in tribal courts. The provision of such remedies promotes

---

171. *Id.* at 558.

172. Other justifications for sovereign immunity have also been advanced, in addition to those discussed here. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1216 (2001) (discussing and rejecting six possible rationales: “the importance of protecting government treasuries; separation of powers; the absence of authority for suits against the government; the existence of adequate alternative remedies; a curb on bureaucratic powers; and tradition”). However, I focus on the notions discussed in the text—in particular, the government-finances rationale and the governmental-dignity rationale—because they are standard justifications for state immunity and they are also strongly applicable to tribal immunity.



governmental dignity; it may well comport with tribal values concerning governmental accountability; and it will in any event be driven by an awareness of the political pressures faced by the tribes. Nonetheless, the doctrine of tribal sovereign immunity will retain central importance because it will enable tribes to limit their waivers of immunity to tribal courts. The use of immunity as a forum-allocation device may help to reverse the effects of recent Indian law decisions that diminish the powers of tribal courts in other respects.<sup>173</sup>

As an initial matter, it is instructive to compare the strength of justifications for state and tribal immunity. Some might cavil at this comparison on the grounds that state sovereign immunity is constitutionally protected whereas tribal sovereign immunity is not mentioned in the Constitution. Such an objection is unpersuasive: Federal sovereign immunity is not mentioned in the Constitution either;<sup>174</sup> and though the Eleventh Amendment's text constitutionalizes state immunity in a narrow subset of cases, the Court has extended the scope of state immunity well beyond that text.<sup>175</sup> Thus, to the extent that the Court's policy justifications

---

173. To use terms familiar from the state sovereign immunity debate, tribal sovereign immunity is, as a formal matter, an immunity-from-liability principle, not merely a forum-allocation principle. Cf. Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity*, 106 YALE L.J. 1683, 1702 (1997) (considering whether Eleventh Amendment immunity is "only an immunity from the original jurisdiction of the federal courts, or . . . also (effectively) an immunity from liability to individuals under federal law"); Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1930 (2000) (arguing that *Alden v. Maine*, 527 U.S. 706 (1999), "implicitly adopted . . . the 'immunity-from-liability' interpretation," but that *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), constitutes "a partial resurrection of the forum-allocation regime"). However, I argue here that, in light of the pressures on tribes to waive immunity, tribal sovereign immunity is more likely to function, in the long run, as a forum-allocation principle.

174. See Seielstad, *supra* note 2, at 670 ("The principle that the United States may not be sued absent express authorization by Congress has been firmly established as a matter of federal common law. The fundamental legal basis for its existence in the common law, however, is less clear."); Jackson, *supra* note 85, at 523 (noting that federal sovereign immunity "is nowhere explicitly set forth in the Constitution").

175. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Supreme Court has extended state sovereign immunity to suits not mentioned in the Amendment, such as suits brought against a state by its own citizens, see *Hans v. Louisiana*, 134 U.S. 1, 4, 21 (1890), suits brought by a foreign state, see *Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934), suits brought by an Indian tribe, see *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779, 782 (1991), and suits brought in state court, see *Alden v. Maine*, 527 U.S. 706, 712 (1999).



for state immunity are at all persuasive, they may also serve to justify tribal sovereign immunity.<sup>176</sup>

A standard rationale for state sovereign immunity is the protection of the state's treasury.<sup>177</sup> Ann Althouse has pointed out that states "cannot, like a private entity, simply go out of business," and that large retrospective damages awards could "sap the states' ability to serve other important public needs."<sup>178</sup> Though commentators have persuasively criticized the notion that immunity is necessary in order to protect a state's finances, such an argument seems much more plausible with respect to tribes.<sup>179</sup> Despite the well-publicized successes of a handful of tribes, most tribes are still struggling economically.<sup>180</sup> It seems quite possible that many Indian tribes would risk insolvency if they were subjected to huge damage awards.<sup>181</sup>

---

176. Judith Resnik has cautioned that comparisons between state sovereignty and tribal sovereignty can be misleading:

At least in theory, states have entered into a compact, called the United States Constitution, and willfully ceded powers to a central government. At least in theory, states participate via their representatives in Congress in the decisions of the national government. Such claims cannot be made, even in theory, for the Indian tribes, whose representatives neither signed the Constitution nor sit in Congress.

Resnik, *supra* note 3, at 680. Nonetheless, in light of the current Court's willingness to go beyond the constitutional text in order to infer constitutional sovereign immunity protections for states, it is significant to note that the policy justifications for tribal immunity are stronger than those for state immunity.

177. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (stating that "the impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury").

178. Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 266 (2000).

179. See, e.g., Fogleman, *supra* note 162, at 1349 ("Courts and commentators have justified the continued existence of tribal sovereign immunity primarily as a means to protect scarce tribal resources.").

180. See Stephen E. Cornell & Joseph P. Kalt, *Successful Economic Development and Heterogeneity of Governmental Form on American Indian Reservations*, in GETTING GOOD GOVERNMENT: CAPACITY BUILDING IN THE PUBLIC SECTORS OF DEVELOPING COUNTRIES 261 (Merilee S. Grindle ed., 1997) ("At present, American Indian citizens on the nation's more than 300 reservations are the poorest minority in the United States. Reservations are commonly characterized by severe unemployment and attendant social and economic symptoms of poverty."); Eric Goveano, Comment, *Tribal Sovereign Immunity: History, Competing Policies, and Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 34 NEW ENG. L. REV. 175, 204 (1999) (noting the argument that "tribes' financial frailty, limited resources, and limited taxing power justify sovereign immunity").

181. See Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1073 (1982) ("Unlike other governmental bodies, Indian tribes would find the loss of assets more difficult to replace because tribes have only a limited revenue base over which to spread any losses.").

Similarly, in the context of suits arising from a government's commercial enterprises, the arguments for tribal immunity seem stronger than those for state immunity. As noted above, the Court in *Kiowa Tribe* questioned whether a tribe should have immunity for its activities in interstate commerce; the Court suggested that tribes have less claim to immunity when they "take part in the Nation's commerce."<sup>182</sup> By contrast, a majority of the current Court maintains that state sovereign immunity extends to the states' commercial activities. Responding to this notion, four members of the Court have argued that Congress should be able to condition states' participation in interstate commerce on a waiver of immunity: "When a State engages in ordinary commercial ventures, it acts like a private person, outside the area of its 'core' responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation."<sup>183</sup> This may well be true for states; they can raise revenue through taxes.<sup>184</sup> But few tribes have any significant tax base. Tribal business enterprises may be the only means by which a tribe can raise revenues—and thus such enterprises may be essential to the fulfillment of the tribe's governmental obligations.<sup>185</sup>

---

182. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998).

183. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 694 (1999) (Breyer, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

184. Similarly, foreign states can raise revenue through means other than commercial ventures; thus, the exception in the Foreign Sovereign Immunities Act ("FSIA") for a foreign state's commercial activities, *see* 28 U.S.C. § 1605(a)(2) (2000), has much less effect on foreign states than would be produced by a similar exception to tribal sovereign immunity. This is particularly true because tribes' limited geographic territories, their location within the United States' boundaries, and their often limited internal economic resources make it particularly likely that tribal enterprises must engage in external commerce in order to succeed. *Cf.* Steve E. Dietrich, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 131 (1992) (advocating tribal sovereign immunity with respect to off-reservation activities because, *inter alia*, "many reservations have very little land" (footnote omitted)). For these reasons, analyses that would model tribal immunity policy on the FSIA are less than fully persuasive. *See, e.g.*, John W. Borchert, Comment, *Tribal Immunity Through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification?*, 13 EMORY INT'L L. REV. 247, 281 (1999) (arguing that "[t]he law of foreign sovereign immunities can serve as a powerful guide as Congress continues to consider legislative proposals" concerning tribal sovereign immunity); Julie A. Clement, Comment, *Strengthening Autonomy by Waiving Sovereign Immunity: Why Indian Tribes Should Be "Foreign" Under the Foreign Sovereign Immunities Act*, 14 T.M. COOLEY L. REV. 653, 683 (1997) (arguing that Congress should "[e]xtend[] the FSIA to Indian tribes").

185. As Lorie Graham has explained:

The *Kiowa* Court . . . fail[ed] to understand the important connection between tribal self-governance and tribal enterprises. Tribal governments are responsible for providing services to their constituencies, such as health, education, law enforcement, and housing, to name a few. Most sovereigns levy taxes to pay for these essential governmental functions. Yet the broad

The Supreme Court's argument concerning the connection between sovereign immunity and sovereign dignity—which is puzzling when invoked in connection with states<sup>186</sup>—seems more persuasive in connection with tribes. Judith Resnik and Julie Chi-hye Suk have recently noted “the utility of institutional dignity, enabling a fledgling organization—be it a court or a nation—to function.”<sup>187</sup> The governmental authority of the states is well established and unquestioned. By contrast, tribes—in part as a result of the past two centuries of federal Indian policy—constantly face challenges to their authority to function as governments.<sup>188</sup> Though Resnik and Suk conclude that institutional dignity concerns fail to justify sovereign immunity,<sup>189</sup> one could argue that to the extent that sovereign immunity promotes the *recognition* of tribes as sovereign entities, it can promote their ability to *function* as such. This is particularly true in the light of the sovereign immunity of the state and federal governments: If states and the federal government possess such immunity, the denial of immunity to tribes might suggest, by comparison, that tribes are not true governmental authorities.<sup>190</sup>

---

array of taxes available to state and local governments are not as readily available to tribes. Indeed, cases such as [Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)] which limit a tribe's ability to tax nonmember commercial enterprises located within the reservation, severely restrict a tribe's ability to raise governmental revenue through taxation. Thus, tribes have had to rely on other revenue streams to meet their governmental responsibilities, most notably commercial enterprises.

Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523, 533–34 (2003) (footnotes omitted).

186. See Althouse, *supra* note 178, at 250 (arguing that the current Court's “insistence on ‘dignity’ for the states sounds like . . . ‘blind deference to “States Rights””); Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 91 (2001) (“To the extent it is designed to serve expressive purposes, a blanket rule of state sovereign immunity rests on a flimsy foundation.”); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1040 (2000) (noting that “broad notions of state dignity are difficult to square with accepted features of constitutional tradition”).

187. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927 (2003).

188. *Cf. id.* at 1946 (noting that “First Nations and indigenous peoples today turn to the concept of dignity to claim political capital”).

189. *See id.* at 1928; *see also infra* notes 215–16 and accompanying text.

190. It is true that the immunity of foreign governments has been limited by the FSIA. However, foreign sovereign immunity is likely to be much less salient, to most domestic observers, than state or federal sovereign immunity, so the most meaningful comparison, arguably, is between states, the federal government, and tribes. It is also true that local governments possess no constitutional immunity from suit; but likening tribal governments to local governments would be misleading because, among other reasons, local governments generally have been viewed as creatures of state law.

Such considerations might support the notion that tribes have more cause than other governments to retain a robust doctrine of sovereign immunity. However, tribes also have reason to be sharply aware of the injustices that can result from such immunity. Sovereign immunity bothers us “because what counts . . . is not reason but force, not law but power, not orderly adjudication but physical taking by the stronger party.”<sup>191</sup> If unchecked assertions of government power render sovereign immunity repugnant, they also scar the history of federal relations with the Indian tribes.<sup>192</sup> Recall Chief Justice Marshall’s justification of the doctrine of discovery: “[P]ower, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.”<sup>193</sup> With respect to many tribes, the notion of federal conquest is apocryphal;<sup>194</sup> but the doctrine of federal plenary power over tribal affairs is a reality which all tribes must face. Part I discussed the troubling origins of that doctrine; it developed from a perverse misconstruction of the United States’ trust responsibility to the tribes, and it was imposed without regard to any notion of tribal consent.<sup>195</sup> The pages of the United States Reports, moreover, are replete with assertions that tribes,

---

191. Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 392 (1970) (emphasis omitted). An excellent article by Andrea Seielstad drew my attention to this quote, though the article did not explicitly draw the connection between Davis’ description of sovereign immunity and the assertion of federal power over Indian tribes. See Seielstad, *supra* note 2, at 767.

192. As Judith Resnik observes: “The United States had the physical power and used it. By virtue of force, the federal government took land, removed people from their homes, attempted to dissuade them from observing their customs, and imposed its rule.” Resnik, *supra* note 3, at 692 (footnotes omitted).

193. *Worcester v. Georgia*, 31 U.S. 515, 543 (1832).

194. See Clinton, *supra* note 7, at 165 (“Contrary to the great American myth . . . actual conquest was not the basis for most of the pacification of the tribes during [the 1860s to 1880s].”) (footnote omitted); cf. Steven Paul McSloy, “*Because the Bible Tells Me So*”: *Manifest Destiny and American Indians*, 9 ST. THOMAS L. REV. 37, 38 (1996) (“The real conquest was on paper, on maps and in laws. What those maps showed and those laws said was that Indians had been ‘conquered’ merely by being ‘discovered.’”).

195. See Clinton, *supra* note 7, at 115 (arguing that “there is no acceptable, historically derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty”); Resnik, *supra* note 3, at 693 (“No consent of the governed (not even weak versions of consent theory) can be offered in support of the authority exercised by ‘the federal system’ over Indian tribes.”). In more recent decades, the Court has suggested that federal power over Indian tribes flows from the Indian Commerce Clause. See Clinton, *supra* note 7, at 195–96. This rationale, too, is questionable. See *id.* at 196 (arguing that since the Court now grounds federal power in the Indian Commerce Clause, “the Indian plenary power doctrine should disappear in favor of a searching textual and historical inquiry into the limits of Indian Commerce Clause power, not unlike the similar inquiry recently undertaken by the Court with reference to the limitations on Interstate Commerce Clause power”).

if they have been wronged by the United States, must seek relief from the political branches of the federal government, not from the courts.<sup>196</sup> Even after the United States waived its sovereign immunity with respect to tribal claims,<sup>197</sup> tribes often have been limited to incomplete remedies.<sup>198</sup> Moreover, some actions are beyond the limits of redress: Even if the courts were inclined to provide relief, what remedy would compensate for federal law's reduction of tribal governmental authority? The history of federal relations with the tribes, then, vividly illustrates the denial of judicial remedies, at worst, or the provision of imperfect remedies, at best.

In addition to harms inflicted by the federal government, many tribes suffered wrongdoing by state governments. A number of states, for example, acquired huge tracts of tribal lands in violation of federal law. Current state sovereign immunity doctrine prevents tribes from suing states for most types of relief concerning these violations,<sup>199</sup> unless the federal

---

196. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) ("If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.").

197. The current waiver with respect to tribal claims for damages—the Indian Tucker Act—is codified at 28 U.S.C. § 1505 (2000). As the Supreme Court recently explained,

[a]lthough the Indian Tucker Act confers jurisdiction upon the Court of Federal Claims, it is not itself a source of substantive rights. To state a litigable claim, a tribal plaintiff must invoke a rights-creating source of substantive law that "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Because "[t]he [Indian] Tucker Act itself provides the necessary consent" to suit, however, the rights-creating statute or regulation need not contain "a second waiver of sovereign immunity."

*United States v. Navajo Nation*, 537 U.S. 488, 503 (2003) (citations omitted) (quoting *United States v. Mitchell*, 463 U.S. 206, 218–19 (1983)).

198. See Steven Paul McSloy, *Revisiting the "Courts Of The Conqueror": American Indian Claims Against the United States*, 44 AM. U. L. REV. 537, 544–45 (1994) (noting instances in which tribal litigants lost due to narrow interpretations of the federal trust obligation and/or "strict construction of the United States' waiver of its sovereign immunity"); but see Newton, *supra* note 59, at 232–33 ("[I]n modern day Indian law, the trust relationship, although not constitutionally based and thus not enforceable against Congress, is a source of enforceable rights against the executive branch and has become a major weapon in the arsenal of Indian rights." (footnote omitted)).

199. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (holding that the Indian Commerce Clause does not empower Congress to abrogate state sovereign immunity); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (holding that states retain sovereign immunity from suits by Indian tribes). The Court reasoned in *Blatchford* that states would not have ratified the Constitution if it had abrogated state immunity from tribal suits because there would have been a lack of "mutuality," in that the Constitution does not abrogate tribal immunity from suits by states. See *Blatchford*, 501 U.S. at 782. This reasoning might lead one to question the holding in *Seminole Tribe*: If the Constitution somehow empowers Congress to abrogate tribal immunity, as the Court has indicated, then (at least as far as the mutuality rationale is concerned) it seems plausible also to infer that the Constitution empowers

government joins in the suit as a plaintiff.<sup>200</sup> In this connection, it is noteworthy that state sovereign immunity doctrines affect tribal land claims more drastically than many other types of claims.<sup>201</sup> Because many land claims assert deprivations of tribal land dating back well over a century, retrospective damages constitute a large part of the potential recovery—but state immunity bars a tribe’s recovery of damages unless the United States sues as co-plaintiff. Apart from damages relief, some land claims seek both possession of land currently held by the state and a declaration that the state lacks regulatory authority over that land—but after the Court’s recent decision in *Idaho v. Coeur d’Alene Tribe of Idaho*,<sup>202</sup> this type of relief likely cannot be sought against state officials under *Ex parte Young*,<sup>203</sup> and thus such relief will likely be barred by state immunity unless the United States joins the suit.<sup>204</sup>

Tribes, then, continue to be denied full relief for violations of their rights by the state and federal governments. The tribes’ experience in this regard illustrates the harmful effects of governmental immunity—though it might, as well, cause some tribes to wonder why they should provide full remedies while continuing to suffer from the denial of such remedies by other governments. However, other considerations are likely to weigh even more heavily in tribes’ current calculus. In particular, tribes are subject to significant political pressure to reduce the scope of tribal sovereign immunity.

As with state sovereign immunity, tribal sovereign immunity limits the remedies available for governmental violations of law, but it does not change the underlying legal obligations of the government in question. Take, for example, the ICRA. Critics have charged that the ICRA imposes upon Indian nations both a general model of individual rights against government that is foreign to the community-oriented value systems of some tribes, and specific obligations that may conflict with a particular tribe’s traditional values.<sup>205</sup> These concerns make some commentators

---

Congress to abrogate state immunity from tribal suits. However, the Court has shown no inclination to explore this line of reasoning.

200. See Catherine T. Struve, *Raising Arizona: Reflections on Sovereignty and the Nature of the Plaintiff in Federal Suits Against States*, 61 MONT. L. REV. 105, 110 (2000).

201. See Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 NEW ENG. L. REV. 571 (2003).

202. 521 U.S. 261 (1997).

203. 209 U.S. 123 (1908).

204. See Struve, *supra* note 201, at 577–80.

205. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 901 (2003) (noting that “[c]ritics of the Indian Civil Rights Act . . . condemn the Act for introducing an alien culture of rights that undermines tribal social organization and value systems”).

ambivalent about the ICRA: they support its protection of individual rights against, for example, sex discrimination, but they recognize that the creation of such rights may interfere with the traditions of some tribes.<sup>206</sup> As Judith Resnik has noted, the debate over the ICRA is a debate over how much difference the federal system will tolerate within the United States' borders.<sup>207</sup>

Because *Martinez*—the decision that has sparked much scholarly debate over the ICRA—ultimately turned upon the existence of a cause of action and the availability of relief against tribal government defendants, discussions of the permissibility of tribal difference from federal civil rights norms sometimes are couched as debates over tribal sovereign immunity. Ultimately, such a focus misses the mark. The existence of tribal immunity does not alter Congress' underlying decision to subject tribes to federal civil rights law. Once it is conceded that Congress has the authority to create ICRA rights, the debate becomes focused on the question of the extent to which individuals can enforce those rights against tribal governments. Tribal immunity does not change the rights-based focus of the question; it merely permits tribes to limit the availability of *remedies* for the violation of those rights. This places tribes in a rhetorically weak position: to the extent that the question is presented as the extent of remedies for violations of concededly valid rights, a tribe that denies all such remedies could be seen as resisting the rule of law. As a practical matter, in the short term, tribal immunity might shield tribes from enforcement by non-tribal courts of requirements imposed in laws like the ICRA. In the longer run, however, tribes will face increasing pressure to provide remedies in tribal court for violations of those laws.

One explanation of the continued assertion of immunity by the state and federal governments is that, aside from public opinion and considerations of justice, there is little pressure for those governments to waive immunity completely. For example, because state immunity is in most instances constitutionally protected from congressional abrogation,<sup>208</sup>

---

206. See Resnik, *supra* note 3, at 727 (“For those of us who believe in women’s rights and are also concerned about federal government imperialism, the [*Martinez*] case becomes hard.”); see also CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 66 (1987) (“I find *Martinez* a difficult case on a lot of levels, and I don’t usually find cases difficult.”); *id.* at 69 (“Since when is male supremacy a tribal tradition? For at least some tribes, since *contact* with European whites.”).

207. See Resnik, *supra* note 3, at 751 (“If the word ‘sovereign’ has any meaning in contemporary federal courts’ jurisprudence, its meaning comes from a state’s or a tribe’s ability to maintain different modes from those of the federal government.”).

208. Congress’s Article I powers do not authorize it to abrogate state sovereign immunity from suit. See *Alden v. Maine*, 527 U.S. 706, 712 (1999); *Seminole Tribe of Fla. v. Florida*, 517



the aggressive use of state immunity ordinarily will not trigger a reduction of that immunity.<sup>209</sup> Likewise, though Congress can subject states to a broad range of regulation, Congress neither could nor would remove the states' general ability to perform basic governmental functions (such as asserting legislative and adjudicative jurisdiction over persons within their borders). States can assert sovereign immunity without concern that such an assertion will trigger congressional reductions in other aspects of state authority. Thus, the Court's expansive doctrine of state sovereign immunity—especially when combined with other doctrines concerning state and local government liability—provides states with significant protection from the full cost of violating federal law.<sup>210</sup>

By contrast, the recurrent political pressure for Congress to abrogate or limit tribal immunity provides a strong incentive for tribes proactively to limit their own immunity.<sup>211</sup> Even isolated denials of remedies by a handful

---

U.S. 44, 72–73 (1996). Congress may abrogate state sovereign immunity in the exercise of its enforcement authority under the Reconstruction Amendments, *see, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), but only if Congress is acting within the scope of its authority to enforce the relevant amendment, *see, e.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (“[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation.”).

209. In at least some instances, states' denials of remedies for states' violations of liberty or property rights could trigger a valid abrogation of state sovereign immunity pursuant to Congress' enforcement power under Section 5 of the Fourteenth Amendment. *See* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alien Trilogy*, 109 YALE L.J. 1927, 1954–55 (2000).

210. *See* Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 483 (2002) (noting that the Court's “pro-federalism majority is pursuing a multi-front battle against suits for damages that disrupt state and local governments' budgets and planning processes: the states are protected by sovereign immunity, while local governments achieve considerable (although not total) protection from the Court's construal of statutory standards for governmental liability”). Admittedly, there still exists some pressure for states to comply with the requirements of federal law, even in the absence of private suits for damages. *See* Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 50 (2003) (noting, in addition to the possibility of federal enforcement suits and suits for injunctive relief under *Ex parte Young*, that “in many instances, state governments face substantial political pressure to comply with national law”).

211. *See* Fogleman, *supra* note 162, at 1357 (“If tribes continue to assert and courts continue to uphold absolute sovereign immunity, Congress will likely face even greater demands from the public, legal community, and other branches of government to waive at least some of the tribes' immunity.”); Limas, *supra* note 130, at 387; Seielstad, *supra* note 2, at 726–27 (discussing a bill proposed by former Senator Slade Gorton that would have abrogated tribal sovereign immunity); WILKINS & LOMAWAIMA, *supra* note 2, at 237–45 (discussing former Senator Gorton's proposals concerning tribal sovereign immunity).



of tribes can lend momentum to campaigns for limits on tribal immunity;<sup>212</sup> although congressional abrogation of all tribal immunity would not be a proportionate response to denials of redress by a few tribes,<sup>213</sup> tribes are justifiably concerned that such denials of remedies could spur congressional action. Likewise, the prospect of continued Supreme Court incursions on other aspects of tribal sovereignty also provides an incentive for tribes to provide effective tribal-court remedies against tribal governments: The more that tribes make clear that such remedies are available for the misuse of governmental power, the less likely the Supreme Court may be to further limit the scope of that power.<sup>214</sup>

In many tribes, tradition may already support the notion that government should account for its actions to those whom it affects. Moreover, a tribe's expansion of remedies against governmental misconduct will contribute to, not detract from, governmental dignity. As Resnik and Suk explain, "[r]ather than being conceived to be insulting or humiliating, the very practice of adjudication should be seen as a form of recognition of the status of democratic sovereigns, committed to renewing

---

212. See Seielstad, *supra* note 2, at 729–35 (discussing testimony at congressional hearings on tribal sovereign immunity during the late 1990s).

213. See Seielstad, *supra* note 2, at 742 (noting that "efforts to amend or reform the entire federal law regarding Indian nations and their relationship with states and the federal government are driven by very few examples—often the most extreme or dysfunctional among them—drawn from a very small sampling of tribal governments").

214. Robert Laurence has made a similar argument with respect to the Court's holding, in *Santa Clara Pueblo v. Martinez*, that ICRA rights are not enforceable in non-tribal court other than through habeas review. Laurence draws a connection between *Martinez* and the Court's holding, in *Oliphant v. Suquamish Indian Tribe*, that tribes lack criminal jurisdiction over non-Indians: "If *Martinez* had come out the other way, the result in *Oliphant* might have been different. The essence of *Oliphant*'s complaint was, or ought to be, that he is being treated—or potentially was being treated—unfairly. The ICRA is the check on tribal unfairness. *Martinez* cut back substantially on the reach of the ICRA." Robert Laurence, *A Quincentennial Essay on Martinez v. Santa Clara Pueblo*, 28 IDAHO L. REV. 307, 338 (1991–92) (footnote omitted). (As Laurence notes, the causal link is not direct: the Court decided *Oliphant* shortly before it decided *Martinez*, and in any event a person who was convicted by a tribal court would be able to seek habeas relief in federal court under the ICRA, even after *Martinez*. See *id.* at 338 n.129; see also Robert Laurence, *Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act*, 10 CAMPBELL L. REV. 411, 418–19 (1988) ("[G]iven that the [ICRA] contains a habeas corpus provision and given further that Mark Oliphant was being 'detained' by the tribe, it would have been perfectly appropriate under the ICRA as it exists today for a federal court to examine his treatment by the tribe.") (footnote omitted).)

Ernest Young has made a somewhat analogous point with respect to state sovereign immunity: "[E]rosion of the states' accountability to federal requirements may discourage the further devolution of federal authority to the state level. Rhetorically speaking, it may tend to blunt the force of arguments that power must be returned to more accountable state governments if those governments become, well, less accountable." Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 63.

their authority through processes of communication and mutual consent.”<sup>215</sup> Resnik and Suk conclude, accordingly, that dignity concerns cannot justify sovereign immunity, though they note that such concerns might support limiting the range of available remedies or providing special methods of adjudication.<sup>216</sup> Tribes, in this view, can best promote their recognition as true sovereigns by providing meaningful remedies for valid claims.<sup>217</sup> For all these reasons, it seems likely that tribes will continue to expand the availability of remedies against governmental defendants.<sup>218</sup>

Thus, as seen in Part III, in many instances tribal immunity serves not so much to bar a plaintiff’s recovery as to limit the fora in which the plaintiff can sue and to regulate the nature and scope of the remedies available. By waiving immunity from suit in tribal court, but not elsewhere, a tribe can provide accountability for governmental behavior while simultaneously reinforcing the authority of tribal courts and providing those courts with the opportunity to develop the substantive law in ways that reflect the tribe’s norms.<sup>219</sup> A tribal court may be better able to adapt civil rights or other laws to fit the preexisting values of the tribe,<sup>220</sup> and the

---

215. Resnik & Suk, *supra* note 187, at 1928.

216. *See id.* at 1928.

217. *See* Seielstad, *supra* note 2, at 668–69 (urging Indian tribes “to take advantage of the current state of the law regarding tribal immunity and continue to enhance their legitimacy and powers of self-governing by developing and strengthening appropriate remedies for tribal members and others to obtain redress for disputes with tribal governments”).

218. *See* Pommersheim, *supra* note 132, at 23 (noting that civil rights litigation in tribal courts, “along with tribal legislative initiatives, will likely further limit the range and applicability of the ancient, western doctrine of sovereign immunity”).

219. *See* Seielstad, *supra* note 2, at 770 (noting that “tribal immunity assists tribes in continuing to strengthen and develop their legal systems, re-infusing them where appropriate with traditional norms and processes that may have been eliminated through the federal government’s colonization of tribal justice systems”). In some instances, tribal immunity may actually aid the extension of civil rights and other protections by tribal courts. For example, a court may be more willing to find that a tribal action violated the applicable law if only prospective remedies are available for that violation. Prospective relief can enforce tribal compliance with the law while protecting scarce tribal resources from large retrospective damages awards. *Cf.* John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (arguing that “the right-remedy gap in constitutional torts facilitates constitutional change by reducing the costs of innovation”).

220. Robert McCarthy’s recent survey of published opinions from various tribal courts found that “despite serious financial constraints, tribal courts have been no less protective of civil rights than have federal courts.” McCarthy, *supra* note 119, at 489. A student note that surveyed tribal court opinions from a number of tribes concluded that the tribal courts in question tend to enforce due process protections and that those courts’ conceptions of due process are similar, in many respects, to non-tribal due process notions. The student also noted some differences: For example, the tribal courts evinced a greater acceptance of the use of informal procedures in some instances. *See* Christian M. Freitag, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831, 864 (1997).

articulation of civil rights or other requirements by a tribal court (rather than a state or federal court) may be received by tribal members as a more authoritative statement of the law, thus promoting compliance.<sup>221</sup> Such suits may foster the development of civil rights protections under tribal law, in cases where tribal law and the ICRA provide alternative bases for relief. In addition, channeling suits against tribal government to tribal courts furthers tribal autonomy; as one commentator has noted, “[p]ersistent suits in state and federal courts over routine tribal decisions could unduly interfere with tribal government and thus defeat the federal policy of Indian self-determination.”<sup>222</sup> Although tribal-court judgments that provide relief against tribal government defendants might also be seen as interfering with the conduct of tribal government, decisions by tribal courts are more likely to provide accurate results in cases where the determination of the claim depends on analysis of tribal law or factual circumstances specific to the tribe.<sup>223</sup>

---

It appears likely that tribal-court enforcement of ICRA provisions has strengthened considerably in recent years; some earlier assessments tended to be more critical of tribal-court performance. Citing eight examples ranging from 1969 through 1985, one commentator suggested that tribes in general, and tribal courts in particular, had failed to appropriately enforce the ICRA’s provisions. See Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65, 101–03 & n.168, 111–12 nn. 209 & 211 (1990). Similarly, Frank Pommersheim and Terry Pechota, writing in 1986, stated that they were “not aware of a single successful ICRA action brought by an Indian plaintiff in any of the tribal courts of South Dakota” and that such cases “are almost always deterred politically or successfully defended on the basis of sovereign immunity.” Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553, 578 & n.163 (1986).

221. Stephen Cornell and Joseph Kalt have made an analogous point concerning the importance of the “fit” of a tribal governmental structure with prior tribal traditions. In their study of tribal economic development, Cornell and Kalt found that certain governmental structures—namely, structures that provided checks and balances and that promoted responsible behavior by tribal government—were associated with higher rates of economic success. See Cornell & Kalt, *supra* note 180, at 264 (“[E]ffective institutions entail devices for limiting the power of the individuals in control of the apparatus of government at any particular time.”). Importantly, however, they also argued that this was true only when the governmental structure had a good “fit” with the tribe’s traditions. See *id.* at 272–73 (noting that when tribal resources and government forms are held constant, “there remain sharp differences in tribal economic performance” among tribes, and theorizing that “such differences arise as a result of mismatches between indigenous tribal sociopolitical norms regarding the location, scope, source, and structure of political authority . . . and the (imposed) formal institutions of tribal government”). Thus, Cornell and Kalt suggest that policymakers should adapt governmental structures to fit the specifics of the particular tribe. See *id.* at 290.

222. Note, *supra* note 181, at 1071.

223. See Pommersheim & Pechota, *supra* note 220, at 577 (“Tribal judicial mechanisms will be more sensitive to the traditional, cultural considerations that are often intertwined with the resolution of reservation disputes.”); Note, *supra* note 181, at 1077 (noting that when a non-

A predictable objection to tribal-court adjudication of claims against tribal governments is that a tribal court may lack the power or inclination to rule against tribal government defendants. The history and current framework of state and federal government waivers of immunity belie the notion that a sovereign's courts will necessarily be impermissibly biased: Both the federal government and the states have chosen to waive immunity only in their own courts, and, in many instances, only in courts specially designated for the purpose of hearing claims against the government.

A related, but distinct, misgiving might arise from the concern that obliging tribal courts to hear claims against tribal governments could actually weaken those courts by creating situations in which other tribal government entities might disregard a tribal-court judgment. Vicki Jackson has suggested that federal sovereign immunity doctrine may have developed in part to "protect[] courts from losing in confrontations with the political branches."<sup>224</sup> However, as Professor Jackson points out, the provision of judicial remedies to those harmed by government action should strengthen, not weaken, judicial legitimacy.<sup>225</sup> In addition, even if tribal government defendants might wish to avoid the imposition of liability by tribal courts, they may be more willing to submit to that liability if they perceive the alternative to be a threat of congressional abrogation of tribal immunity in non-tribal courts.

Recent data suggest that tribal courts have developed significantly in the past thirty years, in terms of their numbers, their staffing, their experience and their independence.<sup>226</sup> Frank Pommersheim has noted the

---

tribal court adjudicates "matters involving tribal disputes and tribal law, the risk of misinterpretation and mistake is even greater than when a federal court interprets state law, because such courts may have limited knowledge of a reservation's conditions and needs").

224. See Jackson, *supra* note 85, at 575–76.

225. See *id.* at 607–08 ("[T]he legitimacy of courts can be reinforced by confronting the government and affording individual relief to those with legitimate claims against the government.").

226. See, e.g., McCarthy, *supra* note 119, at 486 ("There has been a tremendous evolution in tribal court practice in the years since the passage of the ICRA."); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 343 (4th Ed. 2003) (noting "a growing trend in Indian country favoring greater separation of powers"). The AILC Survey provides some data that may shed light on judicial independence in some tribal court systems, but the low survey response rate and ambiguities in the questions preclude the conclusion that the survey results present an accurate picture. See *supra* note 146. In particular, the survey's self-selection bias may well have skewed the responses concerning judicial independence: If, as Cornell and Kalt argue, tribes with government structures that promote governmental accountability are more likely to succeed economically, see *supra* note 221, and if, as suggested in note 146, economically successful tribes may have been disproportionately deterred from responding to the survey, then one might expect the survey results to reflect a disproportionately low level of judicial independence relative to all tribal governments.

“possibilities for confrontation and governmental crisis” that may arise when tribal courts “rule against other branches or parts of tribal government,” but he points out that tribal courts can respond effectively to such issues by using “compelling legal analysis and cultural referents to demonstrate that the decisions comport with both applicable law and cultural standards.”<sup>227</sup> A recent analysis of tribal-court opinions concluded that “the published cases would seem to indicate that tribal courts generally prevail in clashes with tribal councils over interpretation and enforcement of the ICRA and tribal law.”<sup>228</sup>

A number of structural measures, such as the formation of intertribal courts of appeals, can further guarantee the independence of judicial decisions.<sup>229</sup> Increased federal funding is also key: Many tribes need financial help with their efforts to develop their courts and broaden remedies for governmental actions.<sup>230</sup> The American Indian Law Center’s recent survey of tribal courts, though limited by its low response rate,<sup>231</sup> is suggestive in this regard. Among the seventy tribes that responded to the relevant question, the mean annual operating budget for tribal justice systems was \$181,800 and the median annual operating budget was

---

In response to a question asking under what circumstances “[a] judge may be removed from office prior to his/her term expiring,” fifty-nine respondents stated that removal could occur “for cause specified in tribal legislation or contract,” twelve respondents stated that removal could occur “at the discretion of the tribal council, tribal chairperson or tribal administrator,” and twelve respondents stated that removal could occur for “other” reasons. AILC SURVEY, *supra* note 146, app. D at 41. In response to the question “Does the tribal council or any other body other than a formally designated appellate court have the power to review court decisions?”, seventy respondents answered “No” and sixteen respondents answered “Yes.” *Id.* The follow-up question asked, “If no, has the tribal council or chairperson reversed a court decision in a particular case (other than changing the law) outside the prescribed appellate process?”; sixty-two respondents answered “No” and two respondents answered “Yes.” *Id.* In response to the question “Has a judge been removed from office after he or she has issued a controversial decision?”, seventy-six respondents answered “No” and nine respondents answered “Yes.” *Id.*, app. D at 42. The affirmative answers to the last two questions do not indicate when such incidents occurred; it would be useful to know, for example, whether they occurred recently or decades ago. Also, the last question was ambiguous in that it did not specify the timing of removal (prior to, or at, the expiration of the judge’s term?) and did not specify whether it was asking only about instances in which there was a clear causal link between the controversial decision and the removal.

227. Pommersheim, *supra* note 132, at 14–15.

228. McCarthy, *supra* note 119, at 493.

229. In the AILC Survey, 27 respondents reported that an intertribal court of appeals provided their tribe with “judicial panels to hear appeals.” AILC SURVEY, *supra* note 146, app. D at 44.

230. See McCarthy, *supra* note 119, at 513 (noting that “tribal courts are desperately underfunded”).

231. See *supra* note 146 (discussing limitations of the survey data).

\$122,000.<sup>232</sup> Congress—recognizing the need for increased funding—enacted legislation in 1993 and again in 2000 to augment federal financial support for tribal court systems, but it has failed to appropriate money to fund that legislation.<sup>233</sup>

## VI. CONCLUSION

A survey of sovereign immunity—tribal and otherwise—illustrates that the role of courts in holding government accountable has changed over time. Over the past thirty years, tribes have strengthened their court systems and have increased the availability of remedies against tribal governments. Tribes have a strong incentive to continue the expansion of such remedies in order to retain the governmental authority still accorded to them under federal law. The federal government has a responsibility to assist the tribes in undertaking these developments by strengthening tribal courts, supporting the development of tribal economies, and continuing to affirm tribal governmental authority.

Tribal immunity's doctrinal pedigree has protected it, for the moment, from Supreme Court encroachment; but that pedigree does not prove that immunity is normatively desirable and it does not preclude congressional abrogation. The fate of tribal sovereign immunity will rest, not with doctrine, but with Congress and with the tribes themselves. The increasing availability of tribal-court remedies against tribal entities might well escape the notice of the Supreme Court, which lacks the resources, and perhaps the

---

232. See AILC SURVEY, *supra* note 146, at 25; *id.* app. D at 49. These figures are even more striking in the light of the fact that for some of the responding tribes, the tribal justice system budget includes not only funding for court personnel and court facilities but also funding for other justice-related personnel such as prosecutors and probation officers. See *id.* at 25; *id.* app. D at 46–48.

233. See Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified as amended at 25 U.S.C. §§ 3601-3631 (2000)); Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified in scattered sections of 25 U.S.C.). As one commentator noted in 2001,

The Indian Tribal Justice Act and the December 2000 Indian Tribal Justice Technical and Legal Assistance Act both remain unfunded. Already \$58.4 million per year over the past six years should have been requested by the BIA to improve tribal justice systems. Instead, all tribal justice systems (254 Indian court systems in all) exist on \$12 to \$14 million annually. That amounts to \$48,000 per court system—far short of what it takes to run an effective state court system.

Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 124–25 (2001–02); see also Tom Tso, *Indian Nations and the Human Right to an Independent Judiciary*, 3 N.Y. CITY L. REV. 105, 112 (1998) (discussing the need for federal funding of tribal courts).

inclination, to investigate the rich variation in tribal judicial remedies and proceedings. Congress, however, has the capacity to gather data on the development of tribal governments; if the political impetus to abrogate tribal immunity resurfaces, it is to be hoped that Congress will make use of that capacity and will not abrogate tribal immunity from suit in non-tribal court in instances where tribes provide appropriate remedies in their own courts.